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SUPREME COURT, U.S.

## TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1957

No. 382

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THE FIRST UNITARIAN CHURCH OF  
LOS ANGELES, A CORPORATION, PETITIONER,

vs.

COUNTY OF LOS ANGELES, CITY OF LOS ANGELES,  
H. L. BYRAM, COUNTY OF LOS ANGELES TAX  
COLLECTOR, ET AL.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

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PETITION FOR CERTIORARI FILED AUGUST 19, 1957  
CERTIORARI GRANTED OCTOBER 21, 1957

# SUPREME COURT OF THE UNITED STATES

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THE FIRST UNITARIAN CHURCH OF  
LOS ANGELES, A CORPORATION, PETITIONER,

vs.

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[fol. 1]

[File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND  
FOR THE COUNTY OF LOS ANGELES

No. 640026

THE FIRST UNITARIAN CHURCH OF LOS ANGELES,  
a corporation, Plaintiff,

v.

COUNTY OF LOS ANGELES, CITY OF LOS ANGELES, H. L. BYRAM,  
COUNTY OF LOS ANGELES TAX COLLECTOR, and JOHN R.  
QUINN, COUNTY OF LOS ANGELES ASSESSOR, Defendants.

COMPLAINT TO RECOVER TAXES PAID UNDER PROTEST, AND FOR  
DECLARATORY RELIEF—Filed February 10, 1955

Comes now the plaintiff, The First Unitarian Church of  
Los Angeles, a corporation, and for a first cause of action  
against the defendants alleges:

I

Plaintiff, The First Unitarian Church of Los Angeles,  
at all times herein material has been and now is a duly or-  
ganized non-profit religious corporation organized under  
the laws of the State of California, and having its principal  
office in the City of Los Angeles, County of Los Angeles,  
State of California.

[fol. 2]

II

Defendant County of Los Angeles at all times herein  
material has been and now is a duly organized county of the  
State of California, and a body corporate and politic, with  
capacity to sue and be sued under Government Code Sec-  
tion 23004.

III

Defendant City of Los Angeles at all times herein ma-  
terial has been and now is a municipal corporation or-

ganized and existing under and by virtue of the laws of this State and located within the County of Los Angeles, State of California.

#### IV

Defendant H. L. Byram at all times herein material has been and now is the duly appointed, authorized and acting Tax Collector for defendant County of Los Angeles, and is also authorized in law to collect all real property taxes for the defendant City of Los Angeles.

#### V

Defendant John R. Quinn at all times herein material has been and now is the duly elected, authorized and acting Assessor for defendant County of Los Angeles.

#### VI

Plaintiff owns the real property and improvements located in the City and County of Los Angeles described as follows:

Westmont und. 80 100th int. in  
ex. of st. Lot 20 and und. 80 100th  
int. in ex. of st. Lot 21 and und.  
80 100th int. in ex. of st. Lot 22.

The said property so described includes a building located on the said realty, and said building as so described is used solely for religious worship, and is not rented for religious purposes, nor is rent received therefor by plaintiff, the owner, and the whole of the said real property as so de-  
[fol. 3] scribed is required for the convenient use of the said building, all as provided in California Constitution, Article XIII, Section 1½, and Revenue and Taxation Code, Section 206 and 256.

#### VII

All of the facts, matters and conditions set forth in paragraph VI above were true during all times herein material, including the period provided by law for levy and assessment of the taxes herein concerned, and all of said facts, matters and conditions were well and publicly known

in the community of the City and County of Los Angeles and were well known to defendant County of Los Angeles, and its officers and agents, including the County Assessor of said County, and the defendant City of Los Angeles, and its officers and agents, during said time.

### VIII

By reason of Article XIII, Section 11½, of the California Constitution, plaintiff was entitled in law by reason of said facts, matters and conditions as aforesaid to exemption from all taxation as to the said property above described as church property.

### IX

That in timely manner and on or about May 8, 1954, plaintiff duly executed and filed with the office of the County Assessor of defendant County of Los Angeles, John R. Quinn, on forms furnished and required by said county assessor, a claim of exemption from taxation as to said property above described as church property under Article XIII, Section 11½ of the California Constitution above described; that in so making claim of exemption as to said property as church property as aforesaid plaintiff at said time and place fully and duly executed, in manner entitling plaintiff to said tax exemption, the claim-forms required and furnished by the said county assessor, as aforesaid, in all particulars [fol. 4] save in the sole and single respect that plaintiff caused to be stricken therefrom, and declined to execute as being null and void and without warranty in law, the oath prescribed by Revenue and Taxation Code Section 32, enacted statutes of 1953, chapter 1503, Section I, page 3114, reading as follows:

"That applicant does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign Government against the United States in event of hostilities."

### X

That save for plaintiff's refusal as aforesaid to execute the oath contained in Revenue and Taxation Code, Section

32 set forth above, no fact, circumstance or ground existed warranting denial to plaintiff under the law of the church property tax exemption provided by Article XIII, Section 11½ of the California Constitution as to the said property above described.

## XI

That thereafter said county assessor denied and disallowed plaintiff's claim of exemption as church property as to said property, and assessed the said property for taxes without any exemption and at the value of \$94,320.00 (land, \$4,800.00; improvements, 89,520.00), and said assesment (sic) was entered by said county assessor on the County Assessment Roll in the manner provided by law.

## XII

Thereafter in or about October 1954, defendant County Tax Collector H. L. Byram, sent to plaintiff a tax bill for said property for the fiscal year July 1, 1954, to June 30, 1955, demanding payment by plaintiff of taxes on said property [fol. 5] claimed to be due to defendant County of Los Angeles and to defendant City of Los Angeles on the basis of taxes levied by said County and City on said property at the assessed valuation above stated (\$94,320.00) at the rates and percentages as follows: Los Angeles County general taxes, 1.778%; Los Angeles City school taxes, 2.6039%; Los Angeles City general taxes, 1.8279%; said tax bill advised plaintiff that the first one half of the said taxes, totaling the sum of \$3,178.68, was due November 1, 1954 and would be delinquent if not paid by or before December 10, 1954, and that the second one half of the said taxes, totaling the sum of \$3,178.67, was due February 1, 1955 and would be delinquent if not paid by or before April 10, 1955.

## XIII

Thereafter, under and pursuant to Revenue and Taxation Code Sections 5136 et seq. plaintiff, on December 10, 1954, paid under protest the said first installment of the said taxes above described in the sum of \$3,178.68, as aforesaid, and filed with defendant County Tax Collector H. L. Byram

concurrent with said payment plaintiff's "Protest of Tax Payment" protesting and objecting to the entire amount of said taxes as improper and invalid in law, and null and void; a true copy of plaintiff's said "Protest of Tax Payment" is annexed hereto as Exhibit A and made a part hereof and incorporated herein by reference as if set forth here in *haec verba*.

#### XIV

The assessment, imposition and collection of the taxes above described on plaintiff's property above described, and the denial to plaintiff of church property tax exemption under California Constitution, Article XIII, Section 11½ as to the said property, all as aforesaid, were contrary to law and unconstitutional, and the said assessments and taxes were void in entirety and without warranty or right, [fol. 6] all for all of the reasons of violation of the Federal Constitution and of the constitution and statutes of California set forth in detail in the "Protest of Tax Payment" described and incorporated above, including, but not limited to, the following particulars:

1. Revenue and Taxation Code, Section 32, construed consistently with the State and Federal constitutional provisions respecting freedom of religion and other individual liberties as specified in detail in the Protest of Tax Payment, does not authorize exaction of the oath herein complained of in a claim of tax exemption for property as church property;
2. If construed otherwise in the instant case, Revenue and Taxation Code, Section 32, on its face and as applied would violate the limitations and exceed the authority of Article XX, Section 19 of the California Constitution, and would additionally violate all and singular of the provisions of the State and Federal constitutions respecting freedom of religion and freedom of speech, due process of law and equal protection of the laws, and other cognate rights and immunities secured by the California Constitution and by the First and Fourteenth Amendments and other provisions of the United States Constitution all as specified in de-



tail in paragraphs 3(a) to 3 (L) inclusive at pages 4 and 5 of said Protest of Tax Payment;

3. Article XX, Section 19, of the California Constitution, construed consistently with the state and federal constitutional provisions securing freedom of religion and other individual liberties as specified in detail in the Protest of Tax Payment, does not authorize [fol. 7] application, by statute or administrative act, of the oath complained of herein in a claim of tax exemption for property as church property;

4. If construed otherwise in the instant case, Article XX, Section 19, of the California Constitution on its face and as applied would violate all and singular of the state and federal constitutional provisions respecting freedom of religion and freedom of speech, due process of law and equal protection of the laws, and other cognate rights and immunities secured by the California Constitution and by the First and Fourteenth Amendments and other provisions of the United States Constitution all as specified in detail in paragraphs 3(a) to 3(L) inclusive at pages 4 and 5 of said Protest of Tax Payment;

As and for a Second, Separate and Independent Cause of Action, Plaintiff Alleges:.

## I

Plaintiff refers to the allegations in the first cause of action set forth above and by this reference incorporates herein each and all of said allegations in full as if set forth here in *haec verba*.

## II

That an actual controversy has arisen between plaintiff and defendants relating to their respective rights and duties in the premises set forth above; in said controversy plaintiff contends that the denial to plaintiff as to said property above described of the church property tax exemption of Article XIII, Section 11½ of the California Constitution is [fol. 8] invalid, illegal and unconstitutional for all of the



reasons heretofore set forth, whereas defendants and each of them, contends that said denial of said exemption to plaintiff is valid, lawful and proper.

As and for a Third, Separate and Independent Cause of Action, Plaintiff Alleges:

### I

Plaintiff refers to the allegations in paragraphs I-V inclusive of the first cause of action set forth above and by this reference incorporates herein each and all of said allegations in full as if set forth here in *haec verba*.

### II

Plaintiff owns the real property and improvements located in the City and County of Los Angeles described as follows:

Miller and Holsinger Tract Lot 9.

The said property so described includes a building located on the said realty, and said building as so described is used solely for religious worship, and is not rented for religious purposes, nor is rent received therefor by plaintiff, the owner, and the whole of the said real property as so described is required for the convenient use of the said building, all as provided in California Constitution, Article XIII, Section 11½, and Revenue and Taxation Code, Section 206 and 256.

### III

All of the facts, matters and conditions set forth in paragraph II above were true during all times herein material, including the period provided by law for levy and assessment of the taxes herein concerned, and all of said facts, matters and conditions were well and publicly known in the community of the City and County of Los Angeles and were well known to defendant County of Los Angeles, and its officers and agents, including the County Assessor of said [fol. 9] County, and the defendant City of Los Angeles, and its officers and agents, during said time.

## IV

By reason of Article XIII, Section 11½, of the California Constitution, plaintiff was entitled in law by reason of said facts, matters and conditions as aforesaid to exemption from all taxation as to the said property above described as church property.

## V

That in timely manner and on or about May 8, 1954, plaintiff duly executed and filed with the office of the County Assessor of defendant County of Los Angeles, John R. Quinn, on forms furnished and required by said county assessor, a claim of exemption from taxation as to said property above described as church property under Article XIII, Section 11½ of the California Constitution above described; that in so making claim of exemption as to said property as church property as aforesaid plaintiff at said time and place fully and duly executed, in manner entitling plaintiff to said tax exemption, the claim-forms required and furnished by the said county assessor, as aforesaid, in all particulars save in the sole and single respect that plaintiff caused to be stricken therefrom, and declined to execute as being null and void and without warranty in law, the oath prescribed by Revenue and Taxation Code Section 32, enacted statutes of 1953, chapter 1503, Section I, page 3114, reading as follows:

"That applicant does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign Government against the United States in event of hostilities."

[fol. 10]

## VI

That save for plaintiff's refusal as aforesaid to execute the oath contained in Revenue and Taxation Code, Section 32 set forth above, no fact, circumstance or ground existed warranting denial to plaintiff under the law of the church property tax exemption provided by Article XIII, Section 11½ of the California Constitution as to the said property above described.

## VII

That thereafter said county assessor denied and disallowed plaintiff's claim of exemption as church property as to said property, and assessed the said property for taxes without any exemption and at the value of \$2,650.00 (land, \$1,800.00; improvements, \$850.00), and said assessment was entered by said county assessor on the County Assessment Roll in the manner provided by law.

## VIII

Thereafter in or about October 1954, defendant County Tax Collector H. L. Byram, sent to plaintiff a tax bill for said property for the fiscal year July 1, 1954, to June 30, 1955, demanding payment by plaintiff of taxes on said property claimed to be due to defendant County of Los Angeles and to defendant City of Los Angeles on the basis of taxes levied by said County and City on said property, at the assessed valuation above stated (\$2,650.00) at the rates and percentages as follows: Los Angeles County general taxes, 1.778%; Los Angeles City School taxes, 2.6039%; Los Angeles City general taxes, 1.8279%; said tax bill advised plaintiff that the first one half of the said taxes totaling the sum of \$89.31, was due November 1, 1954 and would be delinquent if not paid by or before December 10, 1954, and that the second one half of the said taxes, totaling the sum of \$89.30 was due February 1, 1955 and would be delinquent if not paid by or before April 10, 1955.

[fol. 11]

## IX

Thereafter, under and pursuant to Revenue and Taxation Code Sections 5136 et seq. plaintiff, on December 10, 1954, paid under protest the said first installment of the said taxes above described in the sum of \$89.31 as aforesaid, and filed with defendant County Tax Collector H. L. Byram concurrent with said payment plaintiff's "Protest of Tax Payment" protesting and objecting to the entire amount of said taxes as improper and invalid in law, and null and void; a true copy of plaintiff's said "Protest of Tax Payment", which is identical in form and contents to Exhibit A described above in the first cause of action herein save in de-

scription of the property affected and the amount of assessment and the amount paid under protest, is annexed hereto as Exhibit B and is made a part hereof and incorporated herein by reference as if set forth here in *haec verba*.

### X

The assessment, imposition and collection of the taxes above described on Plaintiff's property above described, and the denial to plaintiff of church property tax exemption under California Constitution, Article XIII, Section 1½ as to the said property, all as aforesaid, were contrary to law and unconstitutional, and the said assessments and taxes were void in entirety and without warranty or right, all for all of the reasons of violation of the Federal Constitution and of the constitution and statutes of California set forth in detail in the "Protest of Tax Payment" described and incorporated above, including, but not limited to, the following particulars:

1. Revenue and Taxation Code, Section 32, construed consistently with the State and Federal constitutional provisions respecting freedom of religion and other individual liberties as specified in detail in the Protest of Tax Payment, does not authorize exaction of the oath herein complained of in a claim of tax exemption for property as church property;

2. If construed otherwise in the instant case, Revenue and Taxation Code, Section 32, on its face and as applied would violate the limitations and exceed the authority of Article XX, Section 19 of the California Constitution, and would additionally violate all and singular of the provisions of the State and Federal Constitutions respecting freedom of religion and freedom of speech, due process of law and equal protection of the laws, and other cognate rights and immunities secured by the California Constitution and by the First and Fourteenth Amendments and other provisions of the United States Constitution all as specified in detail in paragraphs 3(a) to 3(L) inclusive at pages 4 and 5 of said Protest of Tax Payment;

3. Article XX, Section 19, of the California Constitution, construed consistently with the state and federal constitutional provisions securing freedom of religion and other individual liberties as specified in detail in the Protest of Tax Payment, does not authorize application, by statute or administrative act, of the oath complained of herein in a claim of tax exemption for property as church property.

4. If construed otherwise in the instant case, Article XX, Section 19, of the California Constitution on its face and as applied would violate all and singular of [fol. 13] the state and federal constitutional provisions respecting freedom of religion and freedom of speech, due process of law and equal protection of the laws, and other cognate rights and immunities secured by the California Constitution and by the First and Fourteenth Amendments and other provisions of the United States Constitution all as specified in detail in paragraphs 3(a) to 3(L) inclusive at pages 4 and 5 of said Protest of Tax Payment.

As and for a Fourth, Separate and Independent Cause of Action, Plaintiff Alleges:

## I

Plaintiff refers to the allegations in the third cause of action set forth above and by this reference incorporates herein each and all of said allegations in full as if set forth here in *haec verba*.

## II

That an actual controversy has arisen between plaintiff and defendants relating to their respective rights and duties in the premises set forth above; in said controversy plaintiff contends that the denial to plaintiff as to said property above described of the church property tax exemption of Article XIII, Section 11½ of the California Constitution is invalid, illegal and unconstitutional for all of the reasons heretofore set forth, whereas defendants and each of them, contends that said denial of said exemption to plaintiff is valid, lawful and proper.

Wherefore, plaintiff prays:

1. Under the first cause of action for a money judgment against defendants County of Los Angeles and [fol. 14] City of Los Angeles in the amount of the taxes heretofore described paid each of said defendants by plaintiff upon the real property described in said first cause of action;

2. Under the third cause of action for a money judgment against defendants County of Los Angeles and City of Los Angeles in the amount of the taxes heretofore described paid each of said defendants by plaintiff upon the real property described in said third cause of action;

3. Under the second and fourth causes of action for a decree declaring the rights and duties of the parties hereto and declaring that the denial to plaintiff of the exemption of Article XIII, Section 11½ of the California Constitution as to the property affected in said causes of action is illegal and void, and the taxes demanded against plaintiff without said exemption in said causes of action are illegal and void;

4. For costs of suit incurred herein.

5. For such other and further relief as to the court may seem mete and just.

William B. Murrish, Brock, Easton & Fleishman,  
Robert L. Brock, George T. Altman, By William B.  
Murrish.



[fol. 15]

**EXHIBIT A TO COMPLAINT**

**FIRST UNITARIAN CHURCH OF LOS ANGELES**  
 2936 West Eighth Street      Los Angeles 5, California

**PROTEST OF TAX PAYMENT**

December 10, 1954

H. L. Byram  
 County Tax Collector  
 County of Los Angeles  
 Los Angeles, California

Re: Assessment of Taxes on Real Property of  
 the First Unitarian Church of Los Angeles  
 Disallowing Church Exemption.  
 (Parcel No. 915-025-06)

Dear Sir:

This protest is addressed to you as Tax Collector pursuant to the provisions of Section 5136 et seq of the Revenue and Taxation Code.

The First Unitarian Church of Los Angeles herewith delivers to you under protest check in the amount of \$3,178.68 covering the first installment of the taxes assessed under your bill hereafter identified for 1954-1955 taxes on the real property identified in your said bill as "Parcel Number 915-025-06", more fully described in your said bill as:

WESTMONT UND 80 100TH INT IN  
 EX OF ST LOT 20 and UND 80 100TH  
 INT IN EX OF ST LOT 21 AND UND  
 80 100TH INT IN EX OF ST LOT 22.

The whole assessment shown in said bill, to wit: \$6,357.35, and the whole of the first installment thereof as shown therein, to wit: \$3,178.68, are hereby protested and claimed to be void upon the grounds hereafter stated, and payment of the first installment of said assessment is herewith made under such protest. The grounds upon which this protest is made are as follows:



### *Declaration of Principles*

The principles, moral and religious, of the First Unitarian Church of Los Angeles compel it, its members, officers and minister, as a matter of deepest conscience, belief and conviction, to deny power in the state to compel acceptance by it or any other church of this or any other oath of coerced affirmation as to church doctrine, advocacy or beliefs.

The Unitarians of the United States and Canada are united into a federation of liberal churches known as the American Unitarian Association with headquarters at 25 Beacon Street, Boston, Massachusetts.

The Tract Commission of the Association in 1930 adopted as the publishing policy of the Association for books and pamphlets circulated in its name the following: (unanimously adopted by the Board of Directors of the Association)

“Unitarian churches are dedicated to the progressive transformation and ennoblement of individual and social life, through religion, and in accordance with the advancing knowledge and the growing vision of mankind.”

[fol. 16] In 1944 the Board of Directors of the American Unitarian Association adopted the following “Unitarian Working Principles”:

- “1. Individual freedom of belief;
2. Discipleship to advancing truth;
3. The democratic process in human relations;
4. Universal brotherhood, undivided by nation, race or creed;
5. Allegiance to the cause of a united world community.”

Unitarians base their confidence in religious liberty not only in the four-century Unitarian heritages of spiritual independence from their own leaders, Michael Servetus, Francis David, Joseph Priestley, William Ellery Channing and

Thomas Jefferson, but also from the American tradition of religious liberty found in the First Amendment to the Constitution of the United States.

The delegates to the American Unitarian Association assembled in Boston in May, 1954, adopted the following resolution:

*"California 'Loyalty Oath' for Churches"*

"WHEREAS: California has amended its Constitution and enacted laws requiring a 'Loyalty Oath' of all churches claiming tax exemption;

"WHEREAS: Such Constitutional amendment and laws violate the traditional separation of Church and State and seek to establish State control over present and future actions and utterances by the Church in matters of conscience; and

"WHEREAS: This Constitutional amendment and these laws are contrary to the American tradition and are an abuse of the taxing power;

"THEREFORE BE IT RESOLVED: That the American Unitarian Association go on record as condemning this Constitutional amendment and these laws as an attack on freedom of religion and as supporting efforts to test its constitutionality in the courts. (Adopted by majority vote)"

The First Unitarian Church of Los Angeles, California organized in March, 1877, re-organized as "Church of Unity" in 1886, and re-named "The First Unitarian Church of Los Angeles" in January, 1907, states in its By-laws Section 1, (as amended June 12, 1953):

"It is the purpose of the First Unitarian Church of Los Angeles to advocate and practice a universal religion of reason, brotherhood, and good will, enriched by the world's great traditions of the past but captive to none.

"We hold to a common reverence for life, wherever it may be found, giving our allegiance to the use of human reason, to the quest for truth and to the cause of

a united world community undivided by nation, race, or creed.

"We honor all heroic men and women of the past and present coming to us from the earth's rich diversity of faiths and cultures. We pledge ourselves to resist the tendency to formalize religion into cult and sect. We invite persons of differing mind and conscience to share our common cause, to respect our agreements and our differences with generous tolerance and understanding.

"Through the ministry of public services, through the class, the school, the arts, the fellowship of friends, through the disciplines of personal and social responsibility, we affirm our desire to build a church of all peoples based on freedom and united by love."

[fol. 17] These official declarations of individual freedom of mind and conscience echo many classic statements by great American Unitarians whose words are a part of our common culture, notably, William Ellery Channing's address "I Call That Mind Free", Ralph Waldo Emerson's "Divinity School Address" and Theodore Parker's "The Transient and Permanent in Christianity". The Unitarian Churches in America have a 130-year tradition of vigorous protection of individual conscience as a major responsibility of the liberal church. At all levels, local, regional, national and international, Unitarian Churches have consistently advocated the separation of church from the state in matters of opinion, belief and conscience. While the Unitarians have contributed a generous share of leaders to our public life from the beginning of our nation, they have yielded to none a greater devotion to the principle of religious freedom from the invasion of the state into matters of conscience. In recent years the famed Vashti McCollum case in Champaign, Illinois, concerning released time for religious instruction in the public schools, carried to the Supreme Court, determined the freedom of the individual in matters religious. The First Unitarian Church of Champaign, Illinois, aided by an amicus curiae brief from the American Unitarian Association, supported Mrs. McCollum, one of its members, in the exercise of her traditional privileges as an

American and a Unitarian under the First Amendment to the Constitution.

No single principle is more cherished in the Unitarian Churches of this land than that of freedom from secular and state power in matters of religious conviction. On this rock is built the entire structure of our religious institution.

### *Statement of Legal Grounds*

The legal formulation of grounds upon which this tax payment protest is based are as follows:

(1) The First Unitarian Church of Los Angeles heretofore and within the time allowed by law duly filed with you its claim for exemption of the whole of the property herein taxed as church property exempt from taxation under the Constitution and laws of the state, including California Constitution, Article XIII, Section 1½, and Revenue and Taxation Code, Section 206.

(2) In executing and filing said claim of exemption, the First Unitarian Church of Los Angeles caused the same to be completed and filed in all respects in due and proper manner entitling allowance of the exemption claimed, save only the respect that in executing the said claim of exemption on the form supplied and required by you, the said First Unitarian Church caused to be stricken from the body of said claim-form as executed by it the words therein contained set forth below, to wit:

"That applicant does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign Government against the United States in event of hostilities."

- The said quoted language was included by you in the said claim-form as presented to the First Unitarian Church of Los Angeles for execution upon the purported authority and foundation of the provisions of Article XX, Section 19, of the California Constitution,

adopted November 4, 1952, and of Revenue and Taxation Code, Section 32, enacted Stats. 1953, ch. 1503, sec. 1, p. 3114.

(3) The denial by you of church property exemption for the property herein taxed upon the only cause of the striking from the said claim of exemption of the lan- [fol. 18] guage quoted (hereinafter referred to as the Oath)\* is and was an illegal and void act, contrary to law, public policy and morals, and violative of the constitutions of the United States and of the State of California, and the said Oath and Article XX, Section 19, of the California Constitution, and Revenue and Taxation Code, Section 32, separately and collectively, on their face and as applied, violate and offend the constitutions of the United States and of California all in the particulars stated as follows:

(a) The said Oath, as a condition of exemption from taxation, violates freedom of religion, and constitutes an unconstitutional attempt to establish civil jurisdiction over the solely religious subject matter of the "advocacy" of churches and religious associations, and an unconstitutional assertion of power by the state to sit in judgment upon the content of religious doctrine, creed, teachings and beliefs, all in violation of the provisions respecting freedom of religion provided in the First and Fourteenth Amendments of the United States Constitution and of Article I, Section 4, of the California Constitution.

(b) The said Oath also violates the separation of church and state, and constitutes an effort at civil preferment between religious sects, churches, beliefs and creeds, by undertaking to favor by the tax powers of government those sects, churches,

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\* Referred to in Revenue and Taxation Code, Sec. 32, as a "declaration" but required in terms to be made on pain of criminal punishment if false, and accordingly referred to herein as an "oath".

groups, and religious associations, the members of which are willing to subscribe to such oath, and to penalize by the said power in counterpart those sects, churches, groups and religious associations, the members of which are unable or unwilling, by conscience, conviction and belief, to subscribe to such oath or to countenance its exaction, all in further violation of the guarantees of freedom of religion provided in the First and Fourteenth Amendment of the United States Constitution and by Article I, Section 4, of the California Constitution.

(c) The said Oath further offends freedom of religion contrary to the said constitutional provisions above stated in the particular that the said Oath constitutes and requires an oath of expurgation as to religious beliefs and advocacy, and a compelled act of doctrinal affirmation or disavowal,—conduct particularly offensive to religious liberty and particularly violative of the immunity of religious conscience as secured by said constitutional provisions above stated.

(d) The said Oath denies and abridges freedom of speech, press, association, thought, assembly and petition in violation of the First and Fourteenth Amendments of the United States Constitution and of Article I, Sections 9, 10, 1, 2, 3 and 4, of the California Constitution.

(e) The said Oath denies equal protection of the laws to, and directs an improper special law against, the members and adherents of religious sects, churches, groups and associations the members of which are unable, or unwilling, by conscience, conviction and belief, to subscribe to the said oath, or to countenance its exaction, all contrary to the equal protection provisions of the Fourteenth Amendment of the United States Constitution and to the provisions of Article I, Sections 11 and 21, and Article IV, Section 25 of the California Constitution.



(f) The said Oath violates and denies the constitutional requirements of due process of law because of vagueness, uncertainty and indefiniteness, and for the further reason that the exaction of the said Oath generally and as applied at bar bears no reasonable relation to the public welfare, and for other reasons and in other particulars, all in violation of the due process of law provisions of the Fourteenth Amendment of the United States Constitution and of Article I, Section 13 of the California Constitution.

(g) The said Oath constitutes a test oath contrary to the terms of Article VI, paragraph 3 of the United States Constitution.

(h) The said Oath contravenes and violates the requirement of a republican form of government within each of the several states of the United States, contrary to the terms of Article IV, Section 4 of the United States Constitution.

(i) The said Oath violates and denies the privacy of individual conscience, thought, belief, association and affiliation, secured as incidents to the privacy of the ballot as guaranteed by Article II, Section 5 of the California Constitution.

(j) The said Oath violates and contravenes in whole the system of democratic society and individual liberty and self-government provided for and secured by the constitutions of the United States and of the several states, including California, in their whole and their several entireties, including their preambles and declarations of fundamental policies and purposes, wherever expressed, and including the residuary clauses in said constitutions securing to the people all rights, liberties and authority not specially expressed or treated of otherwise, including the Ninth and Tenth Amendments and the Preamble to the United States Constitution, and Article I, Sections 1, 2, 3, 12, and 23 and the Preamble of the California Constitution.



(k) The said Oath violates Article XIII, Section 11½ of the California Constitution, generally, and for the particular reason that said Article XIII, Section 11½ of the California Constitution is self executing, and no requirement of oath or claim may be exacted as a condition to the church property tax exemption created by said Section by its own force.

(L) All of the constitutional objections urged above are urged against the said Oath both upon its face and as applied in the instant case.

(m) Revenue and Taxation Code, Section 32, construed consistently with all of the state and federal constitutional provisions heretofore specified affecting religious freedom and conscience and individual liberty, does not authorize application of the Oath herein complained of to a claim for church property tax exemption, and the exaction of said Oath in the instant case was therefore void and without lawful right.

(n) Revenue and Taxation Code, Section 32, if construed otherwise and to support application of the Oath herein complained of to church property exemption claims and to support its exaction in the premises at bar, goes beyond the authority of Article XX, Section 19, of the California Constitution and violates and contravenes the bounds fixed by said Article XX, Section 19, and further and separately, upon its face and as applied, violates all and singular of the specifications of state and federal constitutional objections set forth above apropos the Oath in sub-paragraphs (a) to (L) inclusive above.

[fol. 20] Article XX, Section 19, of the California Constitution, construed consistently with all of the state and federal constitutional provisions heretofore specified affecting religion freedom and conscience and individual liberty, does not authorize application, by statute or otherwise, of the

Oath complained of herein to a claim for church property tax exemption, and the exaction of the said Oath in the instant case was therefore invalid and void.

(p) Article XX, Section 19, of the California Constitution, if construed otherwise and to support application of the Oath complained of herein to a claim for church property tax exemption and to support exaction of such Oath in the premises at bar, violates, upon its face and as applied, all and singular of the specifications of state and federal constitutional objections set forth above apropos the Oath in sub-paragraphs (a) to (L) inclusive above.

(q) Article XX, Section 19, of the California Constitution is invalid because both it and the initiative related to it embrace and contain more than one subject in violation of the provisions of Article IV, Section 1c of the California Constitution.

WHEREFORE, for all of the reasons above stated the disallowance of church property tax exemption to the First Unitarian Church of Los Angeles here has been and is void, illegal and unconstitutional.

Dated: December 10, 1954.

FIRST UNITARIAN CHURCH OF LOS ANGELES

By ROBERT J. SCHMORLEITZ

Robert J. Schmorleitz,

President, Board of Trustees of the  
First Unitarian Church of Los Angeles.

Receipt of the original of this  
Protest of Tax Payment is hereby  
acknowledged this day, December  
, 1954.

H. L. BYRAM,  
Tax Collector

By: .....

[fol. 21]

## EXHIBIT B TO COMPLAINT

## PROTEST OF TAX PAYMENT

H. L. Byram  
County Tax Collector  
County of Los Angeles  
Los Angeles, California

Re: Assessment of Taxes on Real Property of  
the First Unitarian Church of Los Angeles  
Disallowing Church Exemption.  
(Parcel No. 915-021-09)

Dear Sir:

This protest is addressed to you as Tax Collector pursuant to the provisions of Section 5136 et seq of the Revenue and Taxation Code.

The First Unitarian Church of Los Angeles herewith delivers to you under protest check in the amount of \$89.31 covering the first installment of the taxes assessed under your bill hereafter identified for 1954-1955 taxes on the real property identified in your said bill as "Parcel Number 915-021-09", more fully described in your said bill as:

MILLER AND HOLSINGER TRACT  
LOT 9.

The whole assessment shown in said bill, to wit: \$178.61, and the whole of the first installment thereof as shown therein to wit: \$89.31, are hereby protested and claimed to be void upon the grounds hereafter stated, and payment of the first installment of said assessment is herewith made under such protest. The grounds upon which this protest is made are as follows:

*Declaration of Principles*

The principles, moral and religious, of the First Unitarian Church of Los Angeles compel it, its members, officers and minister, as a matter of deepest conscience, belief and conviction, to deny power in the state to compel acceptance by it or any other church of this or or any other oath of coerced affirmation as to church doctrine, advocacy or beliefs.

The Unitarians of the United States and Canada are united into a federation of liberal churches known as the American Unitarian Association with headquarters at 25 Beacon Street, Boston, Massachusetts.

The Tract Commission of the Association in 1930 adopted as the publishing policy of the Association for books and pamphlets circulated in its name the following: (unanimously adopted by the Board of Directors of the Association)

"Unitarian churches are dedicated to the progressive transformation and ennoblement of individual and social life, through religion, and in accordance with the advancing knowledge and the growing vision of mankind."

[fol. 22] In 1944 the Board of Directors of the American Unitarian Association adopted the following "Unitarian Working Principles":

1. Individual freedom of belief;
2. Discipleship to advancing truth;
3. The democratic process in human relations;
4. Universal brotherhood, undivided by nation, race or creed;
5. Allegiance to the cause of a united world community."

Unitarians base their confidence in religious liberty not only in the four-century Unitarian heritages of spiritual independence from their own leaders, Michael Servetus, Francis David, Joseph Priestley, William Ellery Channing and Thomas Jefferson, but also from the American tradition of religious liberty found in the First Amendment to the Constitution of the United States.

The delegates to the American Unitarian Association assembled in Boston in May, 1954, adopted the following resolution:

*"California 'Loyalty Oath' for Churches*

"WHEREAS: California has amended its Constitution and enacted laws requiring a 'Loyalty Oath' of all churches claiming tax exemption;

"WHEREAS: Such Constitutional amendment and laws violate the traditional separation of Church and State and seek to establish State control over present and future actions and utterances by the Church in matters of conscience; and

"WHEREAS: This Constitutional amendment and these laws are contrary to the American tradition and are an abuse of the taxing power;

"THEREFORE BE IT RESOLVED: That the American Unitarian Association go on record as condemning this Constitutional amendment and these laws as an attack on freedom of religion and as supporting efforts to test its constitutionality in the courts. (Adopted by majority vote)"

The First Unitarian Church of Los Angeles, California organized in March, 1877, re-organized as "Church of Unity" in 1886, and re-named "The First Unitarian Church of Los Angeles" in January, 1907, states in its By-laws Section 1, (as amended June 12, 1953):

"It is the purpose of the First Unitarian Church of Los Angeles to advocate and practice a universal religion of reason, brotherhood, and good will, enriched by the world's great traditions of the past but captive to none.

"We hold to a common reverence for life, wherever it may be found, giving our allegiance to the use of human reason, to the quest for truth and to the cause of a united world community undivided by nation, race, or creed.

"We honor all heroic men and women of the past and present coming to us from the earth's rich diversity of faiths and cultures. We pledge ourselves to resist the tendency to formalize religion into cult and sect. We invite persons of differing mind and conscience to

share our common cause, to respect our agreements and our differences with generous tolerance and understanding.

"Through the ministry of public services, through the class, the school, the arts, the fellowship of friends, through the disciplines of personal and social responsibility, we affirm our desire to build a church of all peoples based on freedom and united by love."

[fol. 23] These official declarations of individual freedom of mind and conscience echo many classic statements by great American Unitarians whose words are a part of our common culture, notably, William Ellery Channing's address "I Call That Mind Free", Ralph Waldo Emerson's "Divinity School Address" and Theodore Parker's "The Transient and Permanent in Christianity". The Unitarian Churches in America have a 130-year tradition of vigorous protection of individual conscience as a major responsibility of the liberal church. At all levels, local, regional, national and international, Unitarian Churches have consistently advocated the separation of church from the state in matters of opinion, belief and conscience. While the Unitarians have contributed a generous share of leaders to our public life from the beginning of our nation, they have yielded to none a greater devotion to the principle of religious freedom from the invasion of the state into matters of conscience. In recent years the famed Vashti McCollum case in Champaign, Illinois, concerning released time for religious instruction in the public schools, carried to the Supreme Court, determined the freedom of the individual in matters religious. The First Unitarian Church of Champaign, Illinois, aided by an amicus curiae brief from the American Unitarian Association, supported Mrs. McCollum, one of its members, in the exercise of her traditional privileges as an American and a Unitarian under the First Amendment to the Constitution.

No single principle is more cherished in the Unitarian Churches of this land than that of freedom from secular and state power in matters of religious conviction. On this rock is built the entire structure of our religious institution.



### *Statement of Legal Grounds*

The legal formulation of grounds upon which this tax payment protest is based are as follows:

(1) The First Unitarian Church of Los Angeles heretofore and within the time allowed by law duly filed with you its claim for exemption of the whole of the property herein taxed as church property exempt from taxation under the Constitution and laws of the state, including California Constitution, Article XIII, Section 11½, and Revenue and Taxation Code, Section 206.

(2) In executing and filing said claim of exemption, the First Unitarian Church of Los Angeles caused the same to be completed and filed in all respects in due and proper manner entitling allowance of the exemption claimed, save only the respect that in executing the said claim of exemption on the form supplied and required by you, the said First Unitarian Church caused to be stricken from the body of said claim-form as executed by it the words therein contained set forth below, to wit:

"That applicant does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign Government against the United States in event of hostilities."

The said quoted language was included by you in the said claim-form as presented to the First Unitarian Church of Los Angeles for execution upon the purported authority and foundation of the provisions of Article XX, Section 19, of the California Constitution, adopted November 4, 1952, and of Revenue and Taxation Code, Section 32, enacted Stats. 1953, ch. 1503, sec. 1, p. 3114.

(3) The denial by you of church property exemption for the property herein taxed upon the only cause of the striking from the said claim of exemption of the lan-



[fol. 24] guage quoted (hereinafter referred to as the Oath)\* is and was an illegal and void act, contrary to law, public policy and morals, and violative of the constitutions of the United States and of the State of California, and the said Oath and Article XX, Section 19, of the California Constitution, and Revenue and Taxation Code, Section 32, separately and collectively, on their face and as applied, violate and offend the constitutions of the United States and of California all in the particulars stated as follows:

(a) The said Oath, as a condition of exemption from taxation, violates freedom of religion, and constitutes an unconstitutional attempt to establish civil jurisdiction over the solely religious subject matter of the "advocacy" of churches and religious associations, and an unconstitutional assertion of power by the state to sit in judgment upon the content of religious doctrine, creed, teachings and beliefs, all in violation of the provisions respecting freedom of religion provided in the First and Fourteenth Amendments of the United States Constitution and of Article I, Section 4, of the California Constitution.

(b) The said Oath also violates the separation of church and state, and constitutes an effort at civil preferment between religious sects, churches, beliefs and creeds, by undertaking to favor by the tax powers of government those sects, churches, groups, and religious associations, the members of which are willing to subscribe to such oath, and to penalize by the said power in counterpart those sects, churches, groups and religious associations, the members of which are unable or unwilling, by conscience, conviction and belief, to subscribe to such oath or to countenance its exaction, all in fur-

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\* Referred to in Revenue and Taxation Code, Sec. 32, as a "declaration" but required in terms to be made on pain of criminal punishment if false, and accordingly referred to herein as an "oath".

ther violation of the guarantees of freedom of religion provided in the First and Fourteenth Amendment of the United States Constitution and by Article I, Section 4, of the California Constitution.

(c) The said Oath further offends freedom of religion contrary to the said constitutional provisions above stated in the particular that the said Oath constitutes and requires an oath of expurgation as to religious beliefs and advocacy, and a compelled act of doctrinal affirmation or disavowal, —conduct particularly offensive to religious liberty and particularly violative of the immunity of religious conscience as secured by said constitutional provisions above stated.

(d) The said Oath denies and abridges freedom of speech, press, association, thought, assembly and petition in violation of the First and Fourteenth Amendments of the United States Constitution and of Article I, Sections 9, 10, 1, 2, 3 and 4, of the California Constitution.

(e) The said Oath denies equal protection of the laws to, and directs an improper special law against, the members and adherents of religious sects, churches, groups and associations the members of which are unable, or unwilling, by conscience, conviction and belief, to subscribe to the said oath, or to countenance its exaction, all contrary to the equal protection provisions of the Fourteenth Amendment of the United States Constitution and to the provisions of Article I, Sections 11 and 21, and Article IV, Section 25 of the California Constitution.

(f) The said Oath violates and denies the constitutional requirements of due process of law because of vagueness, uncertainty and indefiniteness, and for the further reason that the exaction of the said Oath generally and as applied at bar bears no reasonable relation to the public wel-

fare, and for other reasons and in other particulars, all in violation of the due process of law provisions of the Fourteenth Amendment of the United States Constitution and of Article I, Section 13 of the California Constitution.

(g) The said Oath constitutes a test oath contrary to the terms of Article VI, paragraph 3 of the United States Constitution.

(h) The said Oath contravenes and violates the requirement of a republican form of government within each of the several states of the United States, contrary to the terms of Article IV, Section 4 of the United States Constitution.

(i) The said Oath violates and denies the privacy of individual conscience, thought, belief, association and affiliation, secured as incidents to the privacy of the ballot as guaranteed by Article II, Section 5 of the California Constitution.

(j) The said Oath violates and contravenes in whole the system of democratic society and individual liberty and self-government provided for and secured by the constitutions of the United States and of the several states, including California, in their whole and their several entireties, including their preambles and declarations of fundamental policies and purposes, wherever expressed, and including the residuary clauses in said constitutions securing to the people all rights, liberties and authority not specially expressed or treated off otherwise; including the Ninth and Tenth Amendments and the Preamble to the United States Constitution, and Article I, Sections 1, 2, 3, 12, and 23 and the Preamble of the California Constitution.

(k) The said Oath violates Article XIII, Section 11½ of the California Constitution, generally, and for the particular reason that said Article XIII, Section 11½ of the California Constitution is self executing, and no requirement of oath or claim

may be exacted as a condition to the church property tax exemption created by said Section by its own force.

(L) All of the constitutional objections urged above are urged against the said Oath both upon its face and as applied in the instant case.

(m) Revenue and Taxation Code, Section 32, construed consistently with all of the state and federal constitutional provisions heretofore specified affecting religious freedom and conscience and individual liberty, does not authorize application of the Oath herein complained of to a claim for church property tax exemption, and the exaction of said Oath in the instant case was therefore void and without lawful right.

(n) Revenue and Taxation Code, Section 32, if construed otherwise and to support application of the Oath herein complained of to church property exemption claims and to support its exaction in the premises at bar, goes beyond the authority of Article XX, Section 19, of the California Constitution and violates and contravenes the bounds fixed by said Article XX, Section 19, and further and separately, upon its face and as applied, violates all and singular of the specifications of state and federal constitutional objections set forth above apropos the Oath in sub-paragraphs (a) to (L) inclusive above.

[fol. 26] (o) Article XX, Section 19, of the California Constitution, construed consistently with all of the state and federal constitutional provisions heretofore specified affecting religious freedom and conscience and individual liberty, does not authorize application, by statute or otherwise, of the Oath complained of herein to a claim for church property tax exemption, and the exaction of the said Oath in the instant case was therefore invalid and void.

(p) Article XX, Section 19, of the California Constitution, if construed otherwise and to support application of the Oath complained of herein to a claim for church property tax exemption and to support exaction of such Oath in the premises at bar, violates, upon its face and as applied, all and singular of the specifications of state and federal constitutional objections set forth above apropos the Oath in sub-paragraphs (a) to (L) inclusive above.

(q) Article XX, Section 19, of the California Constitution is invalid because both it and the initiative related to it embrace and contain more than one subject in violation of the provisions of Article IV, Section 1c of the California Constitution.

WHEREFORE, for all of the reasons above stated the disallowance of church property tax exemption to the First Unitarian Church of Los Angeles here has been and is void, illegal and unconstitutional.

Dated: December 10, 1954.

FIRST UNITARIAN CHURCH OF LOS ANGELES

By ROBERT J. SCHMORLEITZ

Robert J. Schmorleitz,

President, Board of Trustees of  
the First Unitarian Church of  
Los Angeles.

Receipt of the original of this  
Protest of Tax Payment is hereby  
acknowledged this day, December .....,  
1954.

H. L. Byram,  
Tax Collector

By: .....

[fol. 28] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

No. 640026

[Title omitted]

DEMURRER—Filed March 3, 1955

Defendants and each of them demur to the complaint herein on the ground that the same does not state facts sufficient to constitute a cause of action against defendants, or any of them.

Dated at Los Angeles, California this 2nd day of March, 1955.

Harold W. Kennedy, County Counsel, By /s/ Gerald G. Kelly, Assistant County Counsel; and /s/ Gordon Boller, Deputy County Counsel, Attorney for Defendants.

(Points and Authorities on file  
but omitted herefrom)

• • • • •

[fol. 30] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

No. 640026

FIRST UNITARIAN CHURCH OF LOS ANGELES, a corporation,  
Plaintiff,

v.

COUNTY OF LOS ANGELES, et al, Defendants.

JUDGMENT—April 22, 1955

Defendants herein appeared and demurred to the complaint on file; their demurrer came on for hearing and on



April 19, 1955 was regularly heard and was by the Court, the Hon. Bayard Rhone, Judge presiding, sustained without leave to amend.

Now, Therefore, it is Ordered, Adjudged and Decreed that the action is hereby dismissed and defendants are awarded their costs of \$6.50.

Dated at Los Angeles, California, April 22, 1955.

Bayard Rhone, Judge of the Above Entitled Court.

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[fol. 36] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

Dept. 26

Hon. Bayard Rhone, Judge  
John T. Neville, Deputy Sheriff

[Title omitted]

MINUTE ORDER OF MARCH 10, 1955

Nature of Proceedings:

Demurrer of defendants  
to complaint

Continued to April 1st 1955

This civil minute order was duly entered Mar 14 1955.

Attest: Harold J. Ostly, County Clerk and Clerk of the  
Superior Court of the State of California, in and for the  
County of Los Angeles, By /s/ H. Pease, Deputy.

Posted in R/A

by .....

[fol. 37] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

Dept. 26

Hon. Bayard Rhone, Judge  
John T. Neville, Deputy Sheriff.  
C. J. Towey, Deputy Clerk  
[Title omitted]

MINUTE ORDER OF APRIL 1, 1955

Nature of Proceedings:

Demurrer of defendants  
to complaint  
(second call)

Continued to April 19 1955

This civil minute order was duly entered Apr 5 1955.

Attest: Harold J. Ostly, County Clerk and Clerk of the  
Superior Court of the State of California, in and for the  
County of Los Angeles, By /s/ H. Pease, Deputy.

Posted in R/A

by .....

[fol. 38] Clerk's Certificates to foregoing transcript omitted  
in printing.

[fol. 43] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA  
IN BANK

L.A. 23847

FIRST UNITARIAN CHURCH OF LOS ANGELES, a corporation,  
Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES, CITY OF LOS ANGELES, H. L. BYRAM,  
COUNTY OF LOS ANGELES TAX COLLECTOR, and JOHN R.  
QUINN; COUNTY OF LOS ANGELES ASSESSOR, Defendants  
and Respondents.

OPINION—Filed April 24, 1957

This is an appeal from a judgment for the defendants  
following an order sustaining a general demurrer to the  
complaint without leave to amend.

The action was brought to recover taxes paid under protest and for declaratory relief. The plaintiff is a duly organized non-profit religious organization with its principal office in the City of Los Angeles. It is the owner of real property devoted exclusively to religious purposes and located within the jurisdiction of, and subject to property taxation by, the County and City of Los Angeles. It presented to the assessor of Los Angeles County an application for the exemption of its property, particularly described, for the fiscal year 1954-1955. The application was denied by the assessor on the ground that the plaintiff had not qualified for an exemption because it had failed and refused to include in the application for exemption the non-subversive declarations required by section 32 of the Revenue and Taxation Code. The application was otherwise complete. Thereafter the real property of the plaintiff was assessed as property not exempt, and within the time prescribed by law the plaintiff paid the tax under protest and brought this action for the recovery of the sum so paid. The assessor refused to allow the exemption because of the provisions of section 19 of article XX of the Constitution<sup>1</sup> and section 32 of the Revenue and Taxation Code.<sup>2</sup>

Section 19 of article XX was adopted at the general election on November 4, 1952, and was placed as a new section in that article under the heading "Miscellaneous Subjects." The section reads:

[fol. 45] "Sec. 19. ' Notwithstanding any other provision of this Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:

"(a) Hold any office or employment under this State, including but not limited to the University of California, or with any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State; or

<sup>1</sup> Hereinafter referred to as section 19 of article XX.

<sup>2</sup> This and all other code sections hereinafter referred to will be to sections of the Revenue and Taxation Code unless otherwise indicated.

"(b) Receive any exemption from any tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State.

"The Legislature shall enact such laws as may be necessary to enforce the provisions of this section." (Stats. 1953.)

Following the amendment to the Constitution section 32 was added to the Revenue and Taxation Code in 1953. It is as follows:

"Any statement, return, or other document in which is claimed any exemption, other than the householder's exemption, from any property tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State shall contain a declaration [fol. 46] that the person or organization making the statement, return, or other document does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities. If any such statement, return, or other document does not contain such a declaration, the person or organization making such statement; return, or other document shall not receive any exemption from the tax to which the statement, return, or other document pertains. Any person or organization who makes such declaration knowing it to be false is guilty of a felony. This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution." (Stats. 1953, p. 3114.)

The plaintiff contends that both the constitutional provision and the code section are invalid. It is argued that the imposition and collection of taxes sought to be recovered and the denial of the church property tax exemption provided for in section 11½ of article XIII of the Constitution, as applied to the plaintiff church and all other churches similarly situated, was and is in violation of the provisions of the state and federal constitutions

which require reasonable and proper classifications for [fol. 47] purposes of taxation and provide for freedom of religion, freedom of speech and the protection of other rights specified in the protest a copy of which is attached to and made a part of the complaint. The provisions of the protest will be referred to later on in this opinion.

It is noted that section 19 of article XX does not specifically mention churches or any other organizations or individuals which are subject to its provisions. Its terms are general and apply to all owners of property as to which exemption from taxation might be claimed.

It is fundamental that the payment of taxes has been and is a uniform if not a universal demand of government, and that there is an obligation on the part of the owner of property to pay a tax legally assessed. An exemption from taxation is the exception and the unusual. To provide for it under the laws of this state requires constitutional or constitutionally authorized statutory authority. It is a bounty or gratuity on the part of the sovereign and when once granted may be withdrawn. It may be granted with or without conditions but where reasonable conditions are imposed they must be complied with.

A church organization is in no different position initially than any other owner of property with reference to its obligations to assist in the support of government by the payment of taxes. Church organizations, however, through [fol. 48] out the history of the state, have been made special beneficiaries by way of exemptions. A brief reference to the constitutional and statutory background relating to this and other exemptions in this state will be made.

We find in the Constitution of 1849 the following provisions: "Taxation shall be equal and uniform throughout the state. All property in this state shall be taxed proportion to its value, to be ascertained as directed by law . . ." (Art. XI, §13, Laws of California, 1850-53, p. 57.) No provision for exemption from taxation is found in that Constitution. In 1853 the Legislature passed an act entitled "*AN ACT to provide Revenue for the Support of the Government of this State.*" (Laws of California, 1850-53, p. 669.) In section 1 of article I it was provided that all land in the state owned or claimed by any person or

corporation shall be listed for taxation. In section 2 of the same article it was provided that "The following property shall not be listed for taxation." Then followed several paragraphs where numerous classifications of property are named, such as publicly owned property, town halls, public squares, colleges, schoolhouses, public hospitals, asylums, poor houses, cemeteries (sic) and graveyards. In paragraph 5 it was provided that the following also shall not be listed for taxation: "Churches, chapels, and other buildings for religious worship, with their furniture and equipments, and the lots of ground appurtenant thereto [fol. 49] and used therewith, so long as the same shall be used for that purpose only." (Laws of California, 1850-1853, p. 671.)

This statutory method of providing for exemptions continued until the adoption of the Constitution of 1879. Section 1 of article XIII of the new Constitution required constitutional authority for exemptions. It was there provided that "All property in this State except as otherwise in this Constitution provided, . . . shall be taxed in proportion to its value, to be ascertained as provided by law . . ." In subsequent sections of the same article the exemption of numerous classes of particularly described property is provided for. Section 1½ of article XIII provides for the church exemption as follows: "All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship . . . shall be free from taxation. . . ."

In 1944 section 1c was added to article XIII which provides that "In addition to such exemptions as are now provided in this Constitution, the Legislature may exempt from taxation all or any portion of property used exclusively for religious, hospital or charitable purposes . . ." This provision did not have the effect of changing existing laws with reference to the exemption of church property except to authorize the Legislature to extend the exemption [fol. 50] of that property as provided for in section 1½ of article XIII to its personal property. Whether that section is self-executing is of no concern for in 1903 the



Legislature added section 3611 to the Political Code, repeating the constitutional language which exempted church real property and providing among other things that "any person claiming property to be exempt from taxation under this section shall make a return thereof to the assessor annually, the same as property is listed for taxation, and shall accompany the same by an affidavit showing that the building is used solely and exclusively for religious worship, and that the described portion of the real property claimed as exempt is required for the convenient use and occupation of such building. . . ." (Stats. 1903, p. 21.) The reference in that section to property which "is listed for taxation" was in contemplation of section 8, article XIII of the Constitution, which has provided since 1879 that "The Legislature shall by law require each taxpayer in this State to make and deliver to the county assessor, annually, a statement, under oath, setting forth specifically all the real and personal property owned by such taxpayer, or in his possession, or under his control, at 12 o'clock meridian, on the first Monday of March."

Section 3611 of the Political Code was carried into the Revenue and Taxation Code in 1939 as section 254, which provides that any "person claiming the church . . . exemption shall make a return of the property to the assessor annually, the same as property is listed for taxation, and shall accompany it by an affidavit, giving any information required by the" State Board of Equalization. The form prescribed by the State Board of Equalization includes the non-subversive (sic) portion of the affidavit, which the plaintiff has refused to include in its return.

No meritorious argument has been or can be advanced to the effect that section 19 of article XX is not a valid enactment under state law or that it is inapplicable to the church property exemption provided for in section 11½ of article XIII. Section 19 of article XX was adopted in accordance with the procedures required by the Constitution for an amendment to that document by vote of the electors of this state. Its provisions are plain and unambiguous and require no interpretation in the matter of their prohibitions. In direct terms it provides that no person or organization included in the proscribed class

shall receive an exemption from any tax imposed by the state or any taxing agency of the state. It applies to all tax exemption claimants. Its prohibitions are declared by its own terms and are mandatory and prohibitory. (Const., §22, art. I.) By its enactment the people of the state declared the public policy of withholding from the owners of property in this state who engage in the prohibited activities the benefits of tax exemption. The denounced activities are criminal offenses under state law (Stats. 1919, p. 281), and the act of Congress known as the Smith Act (54 Stat. 670) makes it unlawful to advocate the overthrow of the government by force and violence.

It may properly be said that the primary purpose of the people of the state in the enactment of section 19 of article XX was to provide for the protection of the revenues of the state from impairment by those who would seek to destroy it by unlawful means. It contains no exceptions. It applies to churches when it provides that "Notwithstanding any other provisions of this Constitution" its prohibitions shall apply to all tax exemption claimants, and declares (sic) in effect that the tax revenues of the state shall not be depleted by those who would seek to destroy it in violation of the criminal laws of the state and the nation. It is clear that section 19 of article XX is a valid enactment under the Constitution of the state. That it was properly incorporated in the Constitution as a matter of state policy may not be questioned.

It is then to consider whether section 32 is a valid implementation of section 19 of article XX. Section 32 declares that "This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution." Notwithstanding the fact that a particular provision may be self-executing, legislation enacted in aid [fol. 53] thereof is not invalid. (Chesney v. Byram, 15 Cal. 2d 460, 463.) The code section declares within itself its purpose but that purpose is obvious without the declaration.

The plaintiff contends that section 32 is void for several reasons. First, because of the exception from its requirements of householders who are entitled to an exemption of \$100 of assessed value of their personal property as provided for in section 10½ of article XIII of the Constitu-

tion. It is contended that this exception renders the section lacking in uniformity and thus provides for an unlawful classification of taxable property under the law. Secondly, that it violates the federal constitutional guarantees of separation of church and state and freedom of speech. The first contention will be considered in advance of the others for the reason that it involves the application of the Constitution and laws of the state relating to taxation.

If it be assumed for the moment that section 32 is invalid for any of the reasons stated, still the plaintiff, under the general provisions of state law, is not relieved from its obligation otherwise to disclose the facts required by section 32. In this connection the powers and duties of the assessor and the obligations of the plaintiff as the owner of real and personal property must be considered in the light of state law. Those powers, duties and obligations are set forth generally in the Revenue and Taxation Code.

[fol. 54] It is the duty of the assessor to see that all property within his jurisdiction is legally assessed and that exemptions are not improperly allowed. He is liable on his bond "for all taxes on property which is unassessed through his wilful failure or neglect." (§1361.) By section 441 it is provided in accordance with section 8 of article XIII of the Constitution that "Every person shall file a written property statement, under oath, with the assessor between noon on the first Monday in March and 5 p.m. on the last Monday in May, annually, and within such time as the assessor may appoint. At any time, as required by the assessor for assessment purposes, every person shall furnish information or records for examination." For use by the assessor and the property owner the State Board of Equalization is required to prepare the forms of blanks for the property statement. (§452.) The assessor may subpoena and examine any person in relation to any statement furnished by him. (§454.) Any person who wilfully states to the assessor anything which he knows to be false, in any oral or written statement, even not under oath, but required or authorized to be made and relating to an assessment, is guilty of a misdemeanor. (§461.) Section 462 provides that every person is guilty of a misdemeanor

who, after proper demand by the assessor, refuses to give the assessor a list of his taxable property or "Refuses to swear to the list." By section 463 it is provided, among [fol. 55] other things, that every person shall forfeit \$100 to the people of the state, to be recovered by action brought in their name by the assessor, for each refusal to furnish the property statement or to fail to appear and testify when requested to do so by the assessor.

It thus appears that under the tax laws of the state wholly apart from section 32 it is the duty of the assessor to ascertain the facts with reference to the taxability or exemption from taxation of property within his jurisdiction. And it is also the duty of the property owner to cooperate with the assessor and assist him in the ascertainment of these facts by declarations under oath:

With particular reference to the many and various tax exemptions, the Revenue and Taxation Code provides for the ascertainment of the facts as a prerequisite to qualification for exemptions. Those facts in many instances must be made known to the assessor by the affidavit of the tax exemption claimant. They include, among others, veterans exemptions, church exemptions, welfare exemptions, college exemptions and orphanage exemptions. In the case of the church exemption the affidavit shall give "any information required" to carry the exemption into effect. (§254.) It is significant to note that nowhere in the law of the [fol. 56] state is there a requirement for the property owner to make a showing for tax exemptions in the case of householders, cemeteries (sic), game refuges and a few others. It thus appears that the Legislature in addition to the exception of householders from the requirements of section 32 has made no requirement otherwise for any showing on their part of their right to the exemption, either by affidavit or otherwise. If the exclusion of householders from the requirement of section 32 renders that section void as discriminatory or lacking in uniformity it would seem to follow that the entire Revenue and Taxation Code with reference to procedures to qualify for exemptions would be void for the same reason. But obviously no such claim is made.

As stated it is the duty of the assessor to see that exemptions are not allowed contrary to law and this of course includes those which are contrary to the prohibitions provided for in section 19 of article XX. With the aid of section 32 his task is facilitated by the means therein supplied. Without that aid he is nevertheless required to ascertain the facts with reference to tax exemption claimants. Those facts may be disclosed in several different ways. In the instances in which he is without the assistance or cooperation of the tax exemption claimant and he is relegated [fol. 57] to his own devices in discovering the facts he may do so by the examination under oath of the exemption claimant. (§454.) If he is satisfied from his investigations that the exemption should not be allowed he may assess the property as not exempt and if contested compel a determination of the facts in a suit to recover the tax paid under protest. In such a case it would be necessary for the claimant to allege and prove facts with reference to the nature, extent and character of the property which would justify the exemption and compliance with all valid regulations in the presentation and prosecution of the claim. In any event it is the duty of the assessor to ascertain the facts from any legal source available. In performing this task he is engaged in the assembly of facts which are to serve as a guide in arriving at his conclusion whether an exemption should or should not be allowed. That conclusion is in no wise a final determination that the claimant belongs to a class proscribed by section 19 of article XX or is guilty of any activity there denounced. The presumption of innocence available to all in criminal prosecutions does not in a case such as this relieve or prevent the assessor from making the investigation enjoined upon him by law to see that exemptions are not improperly allowed. His administrative determination is not binding on the tax exemption claimant but it is sufficient to authorize him to tax the property as nonexempt and to place the burden on the claimant to test the validity of his administrative determination in an action at law. For the [fol. 58] obvious purpose, among others, of avoiding litigation, the Legislature, throughout the years has sought to relieve the assessor of the burden, on his own initiative and at



the public expense, of ascertaining the facts with reference to tax exemption claimants. In addition to the means heretofore and otherwise provided by law the Legislature, with special reference to the implementation of section 19 of article XX, has enacted section 32. That section provides a direct, time saving and relatively inexpensive method of ascertaining the facts. The Legislature could take these factors into consideration. It could also take into account the fact that the segment of householders in this state is so overwhelmingly large as compared with others chosen for exemptions that the cost of processing them would justify their separate classification. Where any state of facts can be reasonably conceived which would sustain legislative classification the existence of those facts will be presumed. (*Leland v. Lowery*, 26 Cal. 2d 224, 232-233.) Furthermore, aside from the power of the Legislature to classify for the purpose of general legislation (see *Reclamation District v. Riley*, 492 Cal. 147, 156; 24 Cal. Jur. 432) there is another and more conclusive reason why it may classify the personal property of householders. Section 14 of article XIII of the Constitution was amended in 1933 to provide that the Legislature "shall have the power to provide for the assessment, levy and collection of taxes upon all forms of tangible personal property . . . may [fol. 59] classify any and all kinds of personal property for the purposes of assessment and taxation in a manner and at a rate or rates in proportion to value different from any other property in this State subject to taxation and may exempt entirely from taxation any or all forms, types or classes of personal property." Of this constitutional provision this court said in *Roehm v. County of Orange*, 22 Cal. 2d 280 at pp. 283-284: "Article XIII of the California Constitution as first adopted provided for a uniform property tax upon real and personal property alike. This requirement of uniform taxation of real and personal property, however, has been abandoned by subsequent amendments. Under these amendments the legislature may classify personal property for purposes of taxation or exempt all personal property or any form, type, or class thereof", and on page 285 the court declared that this authorization to the Legislature to classify tangible personal



property is "all inclusive" and covers "all forms" of tangible personal property. The personal property of the householders falls within the kind of personal property which the Legislature was constitutionally authorized to classify for purposes of taxation.

There is therefore no merit in the plaintiff's contention that the exception of householders from the requirements of section 32 renders that section invalid. There is likewise no merit in the contention that the section is invalid because of the failure of the Legislature to include within its requirements those who are entitled to exemptions under [fol. 60] income tax laws and numerous other tax laws wherein certain exemptions are taken into consideration in arriving at the amount of the tax to be paid. Those taxes are in categories which are subject to different treatment by separate classification. The Legislature is at liberty to select one phase of a problem for appropriate action without the necessity of including all others which might be affected in the same field of legislation. (*Williamson v. Lee Optical Co.*, 348 U.S. 438, 489, and cases there cited.) Section 32 applies to all exemption claimants to which it relates and supplies appropriate means for carrying out the purposes of section 19 of article XX. The foregoing application of tax laws of the state is peculiarly a matter of state concern. (*Chanler v. Kelsey*, 205 U.S. 466; *Orr v. Gilman*, 183 U.S. 278; 24 Cal. Jur. 434-435.)

We turn now to the question of the validity of the constitutional amendment and implementing legislation under guarantees of the federal Constitution. We approach this phase of the case in the light of the fact that section 19 of article XX prescribes no penal sanctions and in a governmental sense may be deemed merely a declaration of state policy with reference to its own tax structure. However, the plaintiff has taken the position that this constitutional provision is in reality an unlawful limitation on its constitutional rights which are protected by the federal Constitution. This question is extensively argued on behalf of the plaintiff.

[fol. 61]. It is claimed that section 19 of article XX imposes an unconstitutional condition on the right to a tax exemption in that it violates the First and Fourteenth

Amendments of the federal Constitution which prohibit, among other things, the making of any law "respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." (See *McCullum v. Board of Education*, 333 U.S. 203, 210; *Cantwell v. Connecticut*, 310 U.S. 296.)

Without the slightest doubt the First Amendment reflects the philosophy that church and state should be kept separate. (*Zorach v. Clauson*, [1952] 343 U.S. 306, 312; *Everson v. Board of Education*, 330 U.S. 1, 59.) However, the First "Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. . . ." (*Cantwell v. Connecticut*, *supra*, 310 U.S. 296, 303-304; see also *U.S. v. Ballard*, 322 U.S. 78, 86.) In the present case it is apparent that the limitation imposed by section 19 of article XX as a condition of exemption from taxation, is not a limitation on mere belief but is a limitation on action—the advocacy of certain proscribed conduct. What one may merely believe is not prohibited. It is only advocates of the subversive doctrines who are affected. Advocacy constitutes action and the instigation of action, not mere belief or opinion. (See *Gitlow v. New York*, 268 U.S. 652; *Leubuscher v. Commissioner of Internal Revenue*, 54 Fed. 2d 998, 999.)

[fol. 62] We are concerned then, not with the freedom to believe but with the limited freedom to act. The exercise of religious activity has long been recognized as subject to some limitation if that exercise is deemed detrimental to society. In *Reynolds v. U.S.*, 98 U.S. 145, the plaintiff was a church member and a conscientious practitioner of its established doctrine which encouraged polygamy. The Supreme Court in holding that such religious activity was subject to legislative limitations, stated at page 167 that to permit exceptions based on religious doctrine "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." (See also *Cleveland v. U.S.*, 329 U.S. 14; *Prince v. Massachusetts*, 321 U.S. 158.) There are decisions wherein statutory provisions

having some effect on religious activity have been upheld on the ground that their effect was only incidental. In *Zorach v. Clauson* (1952), *supra*, 343 U.S. 306, the Supreme Court sustained the New York "released time" statutory provisions whereby public schools were permitted to release children for religious purposes during a part of the normal school day. Contentions were made to the effect that those provisions prohibited the "free exercise" of religion or were "respecting an establishment of religion" within the meaning of the First Amendment. The court concluded at pp. 312-313, that the First Amendment "studi- [fol. 63] ously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment . . . We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds."

In the present case there is nothing in the new enactments, either constitutional or statutory, which interferes with the free exercise of religion. The plaintiff is affected not because it is a religious organization but because it is a taxpayer favored in the law by an exemption for which it has refused to qualify. The plaintiff has failed to point out what tenet or doctrine of its faith is infringed upon by compelling it to qualify for the exemption. Those tenets [fol. 64] and doctrines are set forth in a document attached to the protest of the payment of its taxes and is made a part of the complaint. It announces to the world the plaintiff's high principles and purposes. The pro-

hibited activity cannot, with any reason whatsoever, be consistent with or be tolerated by the religious doctrines there published and subscribed to by the plaintiff. As against a claim that such advocacy might be included within religious teaching the Supreme Court has disposed of the contention. In *Murdock v. Pennsylvania*, 319 U.S. 105, the court stated at page 109 that "we do not intimate or suggest . . . that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment. *Reynolds v. U. S.*, 98 U.S. 145, 161-167, and *Davis v. Beason*, 133 U.S. 333 denied any such claim to the practice of polygamy and bigamy. Other claims may well arise which deserve the same fate." In *Davis v. Beason*, cited in the *Murdock* case, the court said of the advocacy of plural marriages: "To call their advocacy a tenet of religion is to offend the common sense of mankind . . . The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of his obedience to His will . . . It is assumed by counsel of the petitioner, that because no mode of worship can be established or religious tenets enforced in this country, therefore any form of worship may be followed and any tenets, however [fol. 65] destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practising them. But nothing is further from the truth . . . It does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion." As above noted the advocacy of the conduct prohibited has been made criminal by Congress (*Smith Act*, 54 Stat. Part I, p. 670 [1940]), and through numerous statutory provisions by state legislatures it is well established that such advocacy is against local public policy. (See *Levering Act*, Stats. 1951 [3rd Ex. Sess. 1950, ch 7], p. 15.) In upholding the validity of the *Levering Act* this court in *Pockman v. Leonard*, 39 Cal. 2d 676, stated that the oath required there and similar in effect to the present one, was "obviously not a test of religious opinion."

It is further claimed by the plaintiff that section 32 imposes unconstitutional limitations upon the exercise of religion. As possibly affecting religion section 32, in addition to the limitations imposed by the Constitution, requires the making of an oath. Since this oath is "obviously not a test of religious opinion" the plaintiff is not excused from making it any more than any other taxpayer. It appears that an oath was subscribed on behalf of the plaintiff by one of its officers when it filed its affidavit with the claim [fol. 66] for exemption and its complaint in this action was also verified on its behalf. If the making of the oath is objectionable to the plaintiff it must be for reasons relating to the content of the particular oath and not merely because it is an oath. This contention, therefore, may not be sustained.

It is also claimed that section 19 of article XX is a restriction on freedom of speech. The phrase "freedom of speech" is helpful in bringing to mind the concept which it means to convey, but as is often the case such a descriptive phrase assumes a literal meaning which causes difficulty and confusion in the development of the law surrounding it. Justice Holmes aptly stated that it "is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." (See *Hyde v. United States*, 225 U.S. 347, 390, 56 L.Ed. 1114, 1135; see also *Corwin, Bowing Out "Clear and Present Danger"*, 27 *Notre-Dame Lawyer* 325.)

Despite the fact that the First Amendment is cast in terms of the absolute it is not to be applied literally. There never has been an absolute right of free speech or an unqualified liberty to speak. "Speech" in the broad sense embodies all means of expression and communication. It is the primary vehicle by which individuals and organizations converse and transmit ideas, information and knowledge, and is deserving of the highest degree of protection [fol. 67] and preservation. But there are other important interests of society which, at times, may conflict with the interest of individuals or groups in the exercise of this asserted freedom. In such circumstances the courts must declare when the individual or group does or does not have a right to speak freely, depending on a balance of



the individual's right to speak out as against the harm or injury society may suffer as a result of such speech. The courts have been called upon to engage in this weighing process in many instances. Illustrative are those which protect society from a breach of the peace (*Chaplinsky v. State of New Hampshire*, 315 U.S. 568), "loud and raucous" noises caused by sound trucks (*Kovacs v. Cooper*, 336 U.S. 77), interruption of the free flow of commerce (*American Communications Association v. Douds*, 339 U.S. 382) and the like.

The standard by which the various interests have been balanced has, until recently, been the so-called "clear and present danger" test. It was heretofore declared that the right to free speech could be infringed upon only in situations where it appeared that the "words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils" sought to be repressed. (*Schenck v. United States*, 249 U.S. 47, 52.) However, in *Dennis v. U. S.*, 341 U.S. 494, the Supreme Court, reviewing its earlier decisions in this field, reconsidered the test in [fol. 68] the light of existing and recognized realities and in conclusion stated: "Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' 183 F. 2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words." By that statement of the test the standard by which a weighing of interests is to be made is clearly indicated.

The interest of the state in protecting its revenue raising program from subversive exploitation has already been considered. There are additional interests with which the state is concerned and which it is attempting to promote by granting exemptions from taxation. Included is the interest of the state in maintaining the loyalty of its people



and thus safeguarding against its violent overthrow by internal or external forces. This legitimate objective is sought to be accomplished by placing in a favored economic position, and thus to promote their well being and sphere of influence, those particular persons and groups of individuals who are capable of formulating policies relating [fol. 69] to good morals and respect for the law. It has been said that when church properties are exempted from taxation "it must be because, apart from religious considerations, churches are regarded as institutions established to inculcate principles of sound morality, leading citizens to a more ready obedience to the laws." (*County of Santa Clara v. Southern Pac. R. Co.*, 18 Fed. 385, 400; 24 Cal. Jur. 105.) The same may be said of others enjoying tax exemptions, notably veterans (§1¼, article XIII; *Allied Architects v. Payne*, 192 Cal. 431; *Veterans' Welfare Board v. Riley*, 188 Cal. 607, 611), colleges (§1a, article XIII) and charitable organizations (§1c, article XIII) which, together with church groups, occupy positions whereby they may exert a salutary (sic) influence on the moral well-being of the community. Encouragement to loyalty to our institutions and an incentive to defend one's country in the event of hostilities are doctrines which the state has plainly promulgated and intends to foster. It is the high purpose residing in its people that the state is attempting to encourage in its endeavor to protect itself against subversive infiltration. The propriety of that objective is recognized by the Supreme Court in the *Dennis* case (*Dennis v. United States*, supra, 341 U.S. 494) where it said at page 509: "Overthrow of the Government by force and violence is certainly a substantial enough interest for [fol. 70] the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected."

Obviously a program of tax exemption designed to promote adherence to the principles of our government but constrained to include within its bounty persons or organizations actively advocating subversion and the support of enemies in time of hostilities, would be wholly without reason and result in its own defeat.

The test requires further that consideration be given not only to the "gravity of the 'evil'" sought to be repressed but that the evil be "discounted by its improbability." The Dennis case involved the validity of the Smith Act which prohibited and made criminal the advocacy of the activities denounced by the people of this state in its Constitution. In speaking of the imminence of the threat posed by the advocacy of subversive activities, the court at page 509 stated: "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, [fol. 71] action by the Government is required. . . . Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent." In that case the court upheld an instruction to the jury that if the defendants actively advocated governmental overthrow by force and violence as speedily as circumstances would permit, then as a "matter of law . . . there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution." In the present case the constitutional provision is concerned with those who advocate the same prohibited activity. It must be said that such advocacy from whatever source poses a threat to our government and that the gravity of the evil is not to be materially discounted by its improbability within the meaning of the test employed in the Dennis case.

Against the fundamental interest sought to be safeguarded by the state it is necessary to consider and balance the interest of those who assert that their right to speak has been unduly limited. From what has heretofore been said it is apparent that the limitation on speech is a conditional one, imposed only if a tax exemption is sought; that [fol. 72] the prohibited advocacy is penal in nature, and that not one of the fundamental guarantees but only a privilege or bounty of the state is withheld if the exemption claimant prefers to engage in the prohibited criminal advocacy. It is obvious, therefore, that by no standard can

the infringement upon freedom of speech imposed by section 19 of article XX be deemed a substantial one.

Apart from considerations involving the constitutional amendment the additional requirement of an oath imposed by section 32, of and by itself, gives no cause for the plaintiff to complain that it is improperly deprived of constitutional freedoms where compliance with the oath requirements otherwise may properly be imposed. (*Chesney v. Byram*, *supra*, 15 Cal. 2d 460, 465-468.)

Statutory limitations on the free exercise of speech similar in nature to the present limitation have been imposed as valid conditions upon which some privilege, benefit or conditional right has been withheld by a state. For example, as a condition to obtaining or maintaining employment state employees have been required to subscribe to oaths which declare their nonadvocacy of subversive activities (*Pockman v. Leonard*, *supra*, 39 Cal. 2d 676); as have county employees (*Hirschman v. County* [fol. 73] of Los Angeles, 39 Cal. 2d 698; *Steiner v. Darby*, 88 Cal. App. 2d 481), municipal employees (*Garner v. Los Angeles Board*, 341 U.S. 716, affirming *Garner v. Board of Public Works*, 98 Cal. App. 2d 493), public school teachers (*Adler v. Board of Education*, 342 U.S. 485; *Steinmetz v. Cal. State Board of Education*, 44 Cal. 2d 816; *Board of Education v. Eisenberg*, 129 Cal. App. 2d 732; *Board of Education v. Wilkinson*, 125 Cal. App. 2d 100), and candidates for public offices (*Gerende v. Election Board*, 341 U.S. 56; *Shub v. Simpson*, 76 A. 2d 332). The right to a bounty or other benefits from the state has been so conditioned in the case of applicants for state unemployment benefits. (*State v. Hamilton*, 110 N.E. 2d 37; *Dworken v. Collopy*, 91 N.E. 2d 564.) Even the right to vote (*Opinion of the Justices*, 40 So. 2d 849), and to citizenship (*U.S. v. Schwimmer*, 279 U.S. 344) has been so conditioned.

The plaintiff contends that the constitutional amendment and implementing legislation are invalid for other reasons based on constitutional guarantees. Such contentions are without merit in view of what has been said in disposing of the basic contentions presented.

Attention has been directed to the recent decision in *Pennsylvania v. Nelson*, 350 U.S. 497 (April 2, 1956).

[fol. 74] wherein the Supreme Court declared invalid a Pennsylvania penal provision (Pa. Penal Code §207, 18 Purdon's Pa. Stat. Ann., §4207) which made it a crime to advocate the violent overthrow of the federal or state government. Reasons for the decision in that case were that Congress had occupied the field to the exclusion of "parallel" state legislation; that the dominant interest of the federal government required that such "prosecutions" should be exclusively within the control of the federal government, and that the "Pennsylvania Statute presents a peculiar danger of interference with the federal program." It is clear from the opinion of the court in that case that the exclusion of state sedition legislation was limited to the imposition of criminal penalties. The court directed its attention to "anti-sedition statutes, criminal anarchy laws, criminal syndicalist laws, etc." No reference is made to the many so-called loyalty oath cases considered by the court in recent years. The court's intention not to change or modify the established law in those cases by what it said in the Nelson case appears from its later opinion in *Slochower v. Board of Education*, 350 U.S. 551, decided on April 9, 1956, one week after the court's decision in the Nelson case. In speaking of balancing the [fol. 75] state's interest in the loyalty of certain persons against the interests of those persons in their individual rights, the court referred by way of illustration to its earlier decisions in *Adler v. Board of Education*, supra, 342 U.S. 485, and *Garner v. Los Angeles Board*, supra, 341 U.S. 716, 720. In both of those cases the court upheld the validity of state legislation which required, as a condition to acquiring or maintaining particular privileges or rights by certain persons, that such persons refrain from advocating the violent overthrow of our form of government. If in the present case the constitutional amendment and implementing legislation infringe upon an area occupied exclusively by Congress within the scope of the decision in the Nelson case, certainly the same conclusion would be true of the enactments involved in the Garner and Adler cases and the court would not have approved those decisions in the Slochower case. Furthermore, in any consideration of the possible application of the Nelson case to the

case at bar, it would be unreasonable to conclude that the federal government intends to or has occupied the field of state taxation.

[fol. 76] Finally it should be observed that we are here dealing with questions of law and not with any questions of fact with reference to the activities of the plaintiff organization. As hereinbefore noted there is attached to the protest filed with the payment of the tax sought to be recovered a statement of the principles and objectives of the plaintiff in furtherance of its religious activities. Those principles and doctrines reflect the high ideals of morality and personal conduct which are basic in the foundation of our system of government both state and national. They are noble in purpose and inspiration in tone. It is inconceivable that an organization actuated by the doctrinal pronouncements there declared would knowingly harbor within itself any person or group of persons who would engage in the subversive activities referred to in section 19 of article XX. It is taken for granted that an organization actuated by those high purposes and ideals would be the first to champion the efforts of the state to protect itself against the destruction of those guarantees which [fol. 77] are necessary to the existence of the plaintiff and to the preservation of the fundamental rights which it otherwise enjoys. But an assumed fact of the non-existence of subversion in an organization is not enough. The law demands the ascertainment of that fact for purposes of taxation and section 32 requires the cooperation of the plaintiff in establishing it.

No good reason has been advanced why churches as well as all of the many other organizations seeking exemption from taxation should not be required to comply with the law of the state providing for assistance to the county assessors in the discharge of their duties to ascertain the facts which would justify the exemption. By the plaintiff's failure and refusal to allege that it has complied with the law which would enable it to qualify for the exemption the complaint fails to state a cause of action. The demurrer was therefore properly sustained without leave to amend.

The judgment is affirmed.

Shenk, J.

We Concur:

Schauer, J.

Spence, J.

McComb, J.

[fol. 78]

DISSENTING OPINION

I dissent.

Section 19 of article XX of the California Constitution and section 32 of the Revenue and Taxation Code unjustifiably restrict free speech. Section 19 in effect imposes a penalty in the form of withholding a tax exemption upon any person or organization that chooses to speak in a certain manner, namely, by advocating overthrow of the federal or state governments by force or support of a foreign government against the United States in event of hostilities. Section 32 provides a special method of enforcing these restrictions as to certain tax exemptions. A person claiming one of these exemptions must make a declaration that he does not advocate the conduct specified in section 19. In effect the provisions impose a tax measured by the exemptions allowed to others not only upon those who advocate overthrow of the government by force or support of a foreign government in event of hostilities, but also upon those who do not advocate such conduct but refuse to declare that they do not.

A restraint on free speech is not less a restraint when it is imposed indirectly through withholding a privilege rather [fol. 79] than directly through taxation, fine, or imprisonment. This court so held in *Danskin v. San Diego Unified School District*, 28 Cal. 2d 536, 547-548, involving a comparable privilege, the use of school buildings for public meetings. "It is true that the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable. . . . The very



purpose of a forum is the interchange of ideas, and that purpose cannot be frustrated by a censorship that would label certain convictions and affiliations suspect, denying the privilege of assembly to those who hold them, but granting it to those whose convictions and affiliations happen to be acceptable and in effect amplifying their privilege by making it a special one. In the competitive struggle of ideas for acceptance they would have a great strategic advantage in making themselves known and heard in a forum where the competition had been diminished by censorship, and their very freedom would intensify the suppression of those condemned to silence. It is not for the state to control the influence of a public forum by censoring the ideas, the proponents, or the audience; if it could, that freedom which is the life of a democratic assembly would be stilled. And the dulling effects of censorship on a community are more to be feared than the quickening influence of a live interchange of ideas."

[fol. 80] The tax exemptions in question are likewise comparable to the privilege of using the mails at less than cost. In *Hannegan v. Esquire*, 327 U.S. 146, 156, the court declared that, "grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. . . . Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. The provisions of the [statute] . . . would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country." The dissent of Mr. Justice Brandeis in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407, 430-431, invoked in the *Esquire* case, reasoned that, "Congress may not through its postal police power put limitations upon the freedom of the press which if directly attempted would be unconstitutional. This court also stated in *Ex parte Jackson* that 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' It is argued

that although a newspaper is barred from the second-class mail, liberty of circulation is not denied, because the first and third-class mail and also other means of transportation [fol. 81] are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and unsubstantial. 'The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name.' (Cumming v. Missouri, 4 Wall. 277, 325.) The Government might, of course, decline altogether to distribute newspapers; or it might decline to carry any at less than the cost of the service; and it would not thereby abridge the freedom of the press, since to all papers other means of transportation would be left open. But to carry newspapers generally at a sixth of the cost of the service and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression."

Although free speech may not be an absolute right, it must be jealously guarded. As the court stated in *American Communications Ass'n v. Douds*, 339 U.S. 382, 412, the first amendment "requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom." That test is still a valid one. It was not repudiated in *Dennis v. United States*, 341 U.S. 494. The court was there concerned not to abolish the clear and present danger test but to bend it to the special situation of a critical time and the [fol. 82] diabolic strategy of the Communist Party. As before, the key word in its solution was danger: "'In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'" (341 U.S. at 510.) There was evidence that the defendants, members of the Communist Party, advocated overthrow of the government by force and violence. The jury was instructed that it could not find them guilty under the statute unless it found that they had conspired with the intent that their advocacy "be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons

to such action, all with the intent to cause the overthrow or destruction" of the government by force. The jury had also to determine whether the defendants intended to overthrow the government "as speedily as the circumstances would permit." Moreover, the court of appeals held that the record supported the conclusion that "the Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party. . . ." (341 U.S. at 498, 511-512.)

[fol. 83] It is essential in each case to inquire into the character of the speech to be restrained and the surrounding circumstances. The probability that advocacy will break out in action depends on the numbers, methods, and organization of the advocates.

The state provisions in question penalize advocacy in a totally different context from that in the Dennis case. The penalty falls indiscriminately on all manner of advocacy, whether it be a call to action or mere theoretical prophecy that leaves the way open for counter-advocacy by others. Moreover, with regard to advocacy of support of a foreign government, the state provisions penalize not only advocacy during actual hostilities but also advocacy during peacetime of action during hostilities that may occur, if at all, in the remote future.

There is no evidence in the present case that plaintiff church or its members advocate the overthrow of the government by force or otherwise. There is no evidence that plaintiff church or any of the organizations seeking tax exemptions are infiltrated by Communists or other disloyal persons, or that they are in any danger of such infiltration. The evidence is all to the contrary. It is baldly assumed that plaintiff church advocates the overthrow of the government by force because it refuses to declare that it does not. It is one thing for a court to sustain convictions after it has concluded following a full trial that it [fol. 84] is dealing with an organization wielding the power of a centrally controlled international Communist move-

ment; it is quite another to deprive a church of a tax exemption on the ground that it will not declare that it does not advocate overthrow of the government.

If it is unconstitutional to restrain plaintiff from advocating overthrow of the government, it is *a fortiori* unconstitutional to require it to prove or declare that it does not advocate overthrow of the government. (See *Danskin v. San Diego Unified School District*, 28 Cal. 2d 536, 548.) Such a restraint is the more vicious because it penalizes not only those who advocate overthrow of the government but also those who do not but will not declare that they do not. There are some who refuse to make the required declaration, not because they advocate overthrow of the government, but because they conscientiously believe that the state has no right to inquire into matters so intimately touching political belief. Rightly or wrongly they fear that such an inquiry is the first step in censorship of unpopular ideas. Even in the face of a bona fide danger, the state has no power to embark on an unnecessary wholesale suppression of liberty. (See *Butler v. Michigan*, 25 U.S.L. Week 4165, 4166.)

The majority opinion, however, invokes the rule that the government may attain a legitimate objective through [fol. 85] means reasonably related thereto even though there is an incidental restraint on speech. Thus, in securing qualified and trustworthy employees for government service a loyalty oath may be required, not for the purpose of restraining speech, but as a means of selection. (*Adler v. Board of Education*, 342 U.S. 485, 492 et seq.; *Garner v. Board of Public Works*, 341 U.S. 716, 720 et seq.; *Gorende v. Election Bd.*, 341 U.S. 56; *Steinmetz v. California State Bd. of Education*, 44 Cal. 2d 816; *Poekman v. Leonard*, 39 Cal. 2d 676.) Similarly, *American Communications Ass'n v. Douds*, 339 U.S. 382, held that in seeking to keep interstate commerce free of political strikes, Congress may require labor officials to file non-Communist affidavits 'as a condition to their unions' invoking the jurisdiction of the National Labor Relations Board.

In such cases it is necessary to determine whether the provisions that incidentally restrain speech are in fact reasonably related to the attainment of the governmental

objective. In *Lawson v. Housing Authority*, 270 Wis. 269, cert. denied, 350 U.S. 882, the Supreme Court of Wisconsin considered a federal statute that provided in effect that no housing unit constructed under the statute could be occupied by a member of an organization designated as subversive by the Attorney General. Pursuant to this statute, the Milwaukee Housing Authority adopted a resolution that required its tenants to execute a certificate of nonmembership in the listed organizations. The court held the resolution [fol. 86] unconstitutional, and after discussing the *Douglas* case stated: "It is beyond our power to comprehend how the evil which might result from leasing units in a federally aided housing project to tenants who are members of organizations designated subversive by the Attorney General is in any way comparable in substantiality to that which would result to the general welfare through communists in control of labor organizations disrupting commerce by calling strikes to carry out Communist Party policy. This court deems the possible harm which might result in suppressing the freedoms of the First Amendment outweigh any threatened evil posed by the occupation by members of subversive organizations of units in federally aided housing projects." (270 Wis. at 287-288.) In considering the same problem, the Supreme Court of Illinois pointed out that, "The purpose of the Illinois Housing Authority Act is to eradicate slums and provide housing for persons of low-income class. [Citation.] It is evident that the exclusion of otherwise qualified persons solely because of membership in organizations designated as subversive by the Attorney General has no tendency whatever to further such purpose." (*Chicago Housing Authority v. Blackman*, 122 N.E. 2d 522, 526.)

In the present case the majority opinion thus states the governmental objective: "Encouragement to loyalty to our institutions and an incentive to defend one's country in the [fol. 87] event of hostilities . . . doctrines which the state has plainly promulgated and intends to foster. It is the high purpose residing in its people that the state is attempting to encourage in its endeavor to protect itself against subversive infiltration. . . . Obviously a program of tax exemption designed to promote adherence to the princi-



ples of our government, but constrained to include within its bounty persons or organizations actively advocating subversion and the support of enemies in time of hostilities, would be wholly without reason and result in its own defeat."

\* The issue thus narrows to whether a state can properly restrain free speech in the interest of promoting what appears to be eminently right thinking. A state with such power becomes a monitor of thought to determine what is and what is not right thinking. Great as a state's police power is, however, the United States Supreme Court has yet to sanction its breaking into people's minds to make them orderly. In holding that school children may not be compelled to salute the flag as a condition to attending public schools, the Supreme Court through Mr. Justice Jackson stated that, "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (Board of Education v. Barnette, 319 U.S. 624, 641-642.)

Advocacy does not occur in an intellectual vacuum. Usually it answers or challenges other advocacy. As Mr. Justice Frankfurter aptly stated in *Dennis v. United States*, 341 U.S. 494, 549-550: "Of course no government can recognize a 'right' of revolution, or a 'right' to incite revolution if the incitement has no other purpose or effect. But



speech is seldom restricted to a single purpose, and its effects may be manifold. A public interest is not wanting in granting freedom to speak their minds even to those who advocate the overthrow of the Government by force. For, as the evidence in this case abundantly illustrates, coupled with such advocacy is criticism of defects in our society. Criticism is the spur to reform; and Burke's ad-[fol. 89] monition that a healthy society must reform in order to conserve has not lost its force. Astute observers have remarked that one of the characteristics of the American Republic is indifference to fundamental criticism. Bryce, *The American Commonwealth*, c. 84. It is a commonplace that there may be a grain of truth in the most uncouth doctrine, however false and repellant (sic) the balance may be. Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed. No matter how clear we may be that the defendants now before us are preparing to overthrow our Government at the propitious moment, it is self-delusion to think that we can punish them for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that in sustaining the convictions before us we can hardly escape restriction on the interchange of ideas."

Section 32 impedes not only advocacy itself but discussion short of advocacy that may be of the utmost value. As Mr. Justice Jackson pointed out in the Dennis case, "Of course, it is not always easy to distinguish teaching or advocacy in the sense of incitement from teaching or advocacy in the sense of exposition or explanation," and Mr. Justice Frankfurter recognized that, "there is no divining rod by which we may locate 'advocacy.' Exposition of ideas readily merges into advocacy." (341 U.S. at 545, [fol. 90] 572.) Yet section 32 compels the cautious to forego discussion for fear they will overstep the line that no divining rod can locate.

Errors in thought or expression are best counteracted by deeper thought and more cogent expression. Only through free discussion can subversive doctrines be understood and effectively combatted. "The interest, which [the First

Amendment] guards, and which gives it its importance, presupposes that there are no orthodoxies—religious, political, economic, or scientific—which are immune from debate and dispute. Back of that is the assumption—itself an orthodoxy, and the one permissible exception—that truth will be most likely to emerge, if no limitations are imposed upon utterances that can with any plausibility be regarded as efforts to present grounds for accepting or rejecting propositions whose truth the utterer asserts, or denies'. . . . In the last analysis it is on the validity of this faith that our national security is staked." (Mr. Justice Frankfurter concurring in *Dennis v. United States*, 341 U.S. 494, 550.)

The majority opinion in the present case goes far beyond any United States Supreme Court decision in upholding legislation that restricts the citizen's right to speak freely. Section 19 of article XX, implemented by section 32 of the Revenue and Taxation Code, arbitrarily assumes that those [fol. 91] who seek tax exemptions advocate overthrow of the government unless they declare otherwise. The provisions infringe the right to engage in such advocacy without reference to its seriousness, inhibit free discussion short of advocacy, and penalize the belief that the government has no right to require professions of innocence in the absence of proof of guilt. A law with such consequences cannot stand in the face of the constitutional guarantees.

I would reverse the judgment.

Traynor, J.

I concur:

Gibson, C.J.

[fol. 92]

#### DISSENTING OPINION

I dissent.

I approach the consideration of this case with a profound consciousness that the problems involved may have a direct impact upon the stability of our state and federal governments. Evidently those who enacted the legislation here involved felt that it was necessary to preserve the status quo of those governments. On the other hand the plaintiff

challenges the enactments as an invasion of fundamental constitutional guarantees to it and other religious institutions. We are, therefore, at the outset, faced with the problem as to what sanctions, in the way of pledges of fealty and loyalty, our government may exact from a taxpayer in order to qualify the latter for a tax exemption granted to all in the same class. The solution of this problem depends upon our interpretation and application of the constitutional guarantees relied upon by plaintiff as barriers against such sanctions.

It must be remembered that while our government was "conceived in liberty," it was born in revolution. The Declaration of Independence was the antithesis of a pledge of allegiance or loyalty to the British government of which [fol. 93] the then American colonists were a part. This memorable document epitomized the concept of its framers of the objects and purposes of government and the right of the people to change it by force if necessary. It declared: "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and, accordingly, all experience hath shown that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government and to provide new guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government."

[fol. 94] The events which followed the adoption of the Declaration of Independence by the Continental Congress on July 4, 1776, are well known to every student of American history. These events culminated in the Constitutional Convention at Philadelphia during the summer of 1787 where the Constitution of the United States was drafted. Many of the delegates at the Constitutional Convention had been members of the Continental Congress which had adopted the Declaration of Independence. They were revolutionists in the truest and most dignified sense. It should be remembered that the Declaration of Independence and the Constitution of the United States were prepared by a group of men who had endured tyranny under a monarchical form of government for over three generations. They were the leaders in the struggle which overthrew that government and they sought to establish a government of the people, by the people, and for the people, which would derive its just powers from the consent of the governed. They sought to establish justice, ensure domestic tranquility, promote the general welfare, provide for the common defense and secure the blessings of liberty to themselves and their posterity—a government which would govern without tyranny and without oppression, and which would guarantee to the governed all of the liberty that a free people in a homogenous society could enjoy.

The great liberality accorded to the guarantees of freedom of speech and press by those at the head of our [fol. 95] government during its formative period is exemplified by the following statement in the First Inaugural Address of President Thomas Jefferson. He there declared: "If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." This same concept was again expressed by Mr. Jefferson in his letter to Benjamin Rush in these words: "I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man." This concept was more recently depicted by Mr. Justice Brandeis in *Whitney v. California*, 274 U. S. 357, in words that will forever be a part of our American

heritage. "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the process of popular government, no danger flowing from free speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may be fatal before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

[fol. 96] Over a century and a half has elapsed since the above quoted utterances of Thomas Jefferson. Our government has withstood one major revolution and several minor armed rebellions but the fundamental basic concept of civil liberties embraced within the Bill of Rights has remained unimpaired.

It is worthy of note that the framers of the Constitution of the United States saw fit to exact of the person who assumed the office of President a very simple oath which reads as follows: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States." (U. S. Const., art. II, § 1.) This is the only oath mentioned in the Constitution. Notwithstanding the great trust reposed in and power conferred upon the President of the United States by the Constitution and laws enacted by Congress, no other oath or pledge of loyalty may be exacted of him. Nevertheless no president has ever been suspected of disloyalty. It may be said with confidence that history has demonstrated the wisdom of the framers of the Constitution in drafting an oath so simple and yet so effective that it has endured the tests of time and trial. The past at least is secure. But such an oath was not deemed sufficient to insure the loyalty and fealty of the Vice President, members of Congress and other officials [fol. 97] of our national government. Although no other official of our government possesses the power or authority

of the President, they are required to take an oath much more exacting as it amounts to a pledge of allegiance. This oath is contained in an act of Congress and is as follows: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." (U. S. Code, Title V, § 16, pp. 10-11, U. S. C. 1952 ed., Titles 1-14.) I find no fault with this oath and recognize the propriety of exacting such an oath from one who assumes an official position with our government. It will be observed, however, that neither of the above quoted oaths has the slightest resemblance to the test oath here involved. In commenting on such an oath Dr. Carl Joachim Friedrich, Professor of Government, of Harvard University had the following to say: "It is depressing to realize that the oath has always cropped up as a political device when the political order was crumbling. In the period of religious dissensions the oath of allegiance made its appearance in England as an instrument of intolerance and, a little later, of royal oppression. James Stuart, the tiresome pedant on the throne, sought refuge in an oath required of all ministers [fol. 98] and the like (most teaching then being religious). At that time the imperial pretensions of the 'reformed' papacy, the right of the Pope claimed by the Jesuits to absolve the subjects of an heretical king from their allegiance, made the king desirous of testing the loyalty of his more influential subjects. Yet not many years later his son's head rolled into the sand.

"Following that, Oliver Cromwell in his desperate efforts to find a legitimate basis for his dictatorial regime, demanded an oath preceding the election of parliament in 1653 that no one participating in the election would allow the constitution 'as settled in one person and parliament' to be disturbed. But Cromwell died and the oath was forgotten. The rupture which the oath was supposed to heal did not disappear until toleration and a liberal, truly



constitutional government had taught people how Catholic and Protestant, how parliamentary and authoritarian, how Whig and Tory could live peaceably together, with no one requiring the other to swear oaths which were either unnecessary or ineffectual.

"And where have oaths appeared in our own day? In Fascist Italy and in Nazi Germany. In both of these countries the dictators have promulgated requirements according to which the teachers and professors have to swear an oath of allegiance to the Duce, the Leader. But what, one may ask, was the object of demanding such a [fol. 99] declaration from men who every day were obliged to mold their words and their teachings to the Fascist creed? The purpose was to humiliate or to destroy them. There were plenty of men who were known to the students as non-Fascists, non-Nazis. If they could be forced into swearing their allegiance to the official creed, they were morally discredited, they were shown to be trimmers. What is more, the man of integrity and of faith is the really dangerous enemy. He would not consent. He would protest. Gaetano Salvemini, now teaching at Harvard, is such a man. He knew the game of Mussolini and he left." (Article entitled "Teacher's Oaths," published in the January, 1936 issue of Harper's, Vol. 172 at p. 171.)

At this point, I cannot refrain from quoting the words of warning contained in the powerful concurring opinion of Mr. Justice Black in *Wieman v. Updegraff*, 344 U. S. 183, 192: "History indicates that individual liberty is intermittently subjected to extraordinary perils. . . . The first years of our Republic marked such a period. Enforcement of the Alien and Sedition Laws by zealous patriots who feared ideas made it highly dangerous for people to think, speak, or write critically about government, its agents, or its policies, either foreign or domestic. [fol. 100] Our constitutional liberties survived the ordeal of this regrettable period because there were influential men and powerful organized groups bold enough to champion the undiluted right of individuals to publish and argue for their beliefs however unorthodox or loathsome. Today, however, few people and organizations of power and influence argue that unpopular advocacy has

this same wholly unqualified immunity from governmental interference. For this and other reasons the present period of fear seems more ominously dangerous to speech and press than was that of the Alien and Sedition Laws. Suppressive laws and practices are the fashion. The Oklahoma oath statute is but one manifestation of a national network of laws aimed at coercing and controlling the minds of men. Test oaths are notorious tools of tyranny. *When used to shackle the mind they are, or at least they should be, unspeakably odious to a free people.* Test oaths are made still more dangerous when combined with bills of attainder which like this Oklahoma statute impose pains and penalties for past lawful associations and utterances. [fol. 101] "... Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended. *We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven.* And I cannot too often repeat my belief that the right to speak on matters of public concern must be wholly free or eventually be wholly lost." (Emphasis added.)

History is replete with accounts of the many stratagems created by tyrants to violate the individual's liberty. But it is also replete with accounts of man's constant warfare against these devices and victories won by courageous judges, legislators, administrators, lawyers, and citizens.

In 1787, the founders of this nation assumed that they had settled these matters for all time when they drew upon the lessons of history and wrote a Bill of Rights to assure the individual permanent freedom from official tyranny, and the right freely to participate in the process of self-government.

[fol. 102] "Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go *pari passu* with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different fact, if used by a government determined to suppress political

opposition under the guise of sedition." (Learned Hand, J., in *United States v. Kirschenblatt* (C.C.A. 2d), 16 F. 2d 202, 203, 51 A.L.R. 416.)

"These specific grievances and the safeguards against their recurrence were not defined by the Constitution. They were defined by history. Their meaning was so settled by history that definition was superfluous. . . . Upon this point a page of history is worth a volume of logic.' *New York Trust Co. v. Eisner*, 256 U.S. 345, 349." (Frankfurter, J., *U. S. v. Lovett* (1945), 328 U.S. 303, 321, 323.)

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd v. United States*, 116 U.S. 616, in *Weeks v. United States*, 232 U.S. 383, and in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385) have declared the importance to *political liberty* and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The [fol. 103] effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property;' that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties to the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly over-zealous executive officers." (*Gould v. United States* (1920), 255 U.S. 298, 303, Clarke, J.) (Emphasis supplied.) See also: Brandeis, J. dissenting, *Olmstead v. United States* (1927), 277 U.S. 438, 476, 478, and *Jones v. Securities and Exch. Com.* (1935), 298 U.S. 1, 28.

"If there is one fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess* by word or act their faith therein." (Jackson, J.,

n *West Virginia v. Barnette* (1943), 319 U.S. 624, 642.)  
(Emphasis supplied.)

[fol. 104] The story of the rise and fall of the *oath ex-officio* needs to be retold. It will be recalled that the early 200's were marked by the adoption of this procedural device in the ecclesiastical courts. In this period the inquisitional oath began to take the place of the trial by compurgation oaths in the ecclesiastical courts. The compurgation trials conducted with the device of "oath helpers" had become little better than a farce. The new method of the *oath ex-officio* was one which pledged the accused to answer truly and was followed by a rational process of judicial probing by questions on the specific details of the affair. In a footnote by John H. Wigmore in 15 *Harvard Law Review* 615, it is stated that by the middle of the 13th century "the new oath became the customary instrument in the papal inquisition of heresy; which, indeed, owed its effectiveness largely to the new methods."

Liberals in the church courts insisted that the oath could only be imposed if the court had a rational hypothesis for proceeding against the suspect. Such rational hypothesis could either be *fama publica* or *clamosa insinatio*. However, this was too mild for those who wanted a more rigorous pursuit of heretics and schismatics, and they finally prevailed in establishing the doctrine that the oath could be imposed by the church official *ex-officio* without any antecedent foundation. This extreme position, however, [fol. 105] directly resulted in the downfall of the power of the ecclesiastical courts because of the public indignation it aroused.

The ordinary course of trial by the Inquisition was this. A man would be reported to the inquisitor as of ill-repute for heresy, or his name would occur in the confessions of some other prisoners. A secret inquisition would be made and all accessible evidence against him would be collected. When the mass of surmises and gossip, exaggerated and distorted by the natural fear of the witnesses, eager to save themselves from the suspicion of favoring heretics, grew sufficient for action, the blow would fall. The accused was then prejudged. He was assumed to be guilty, or he

would not have been put on trial, and virtually his only mode of escape was by confessing the charges against him, abjuring heresy, and accepting whatever punishment might be imposed on him in the shape of penance. Persistent denial of guilt and assertion of orthodoxy, when there was evidence against him, rendered him an impenitent, obstinate heretic, to be abandoned to the secular arm and consigned to the state. (See Henry Charles Lea, *A History of the Inquisition of the Middle Ages*, I, p. 407.)

However, the English people early registered their resistance to general inquisitorial methods and their attendant abuses. A statute passed in 1360 in the reign of [fol. 106] Edward III, provided, "that all general inquiries before this time granted within any seignories, for the mischiefs and oppression which have been done to the people by such inquiries, shall utterly cease and be repealed." (34 Edw. III, ch. 1.)

But in 1583 the Court of High Commission in Causes Ecclesiastical, under the leadership of Archbishop Whitgift, started a crusade against heresy wherever it could be found, examining suspected persons under oath in most extreme *ex-officio* style.

In 1609 Sir Edward Coke, as Chief Justice of Common Pleas, granted prohibition against the High Court of Ecclesiastical Causes in *Edward's* case. (13 Rep. 9.) Edward had been charged with libel and the church court put him under the *ex-officio* oath to compel him to state his meaning of the libelous words he was accused of uttering. The common law court took jurisdiction away from the church court upon the ground, among others, that "in cases where a man is to be examined upon his oath, he ought to be examined upon acts or words, and not of the intentions or thought of his heart; and if any man should be examined upon his oath of the opinion he holdeth concerning any point of religion, he is not bound to answer the same."

But the oath *ex-officio* persisted and the Court of the Star Chamber began during James' reign to use the *ex*-[fol. 107] *officio* oath in stamping out sedition. Here the common law courts were powerless to prevent employment of the oath procedure because they lacked jurisdiction over the Court of the Star Chamber.



In 1639 the Court of the Star Chamber examined John Lilburn, "Freeborn John," an opponent of the Stuarts, on a charge of printing or importing certain heretical and seditious books. Lilburn refused to answer questions "concerning other men, to insnare me, and to get further matter against me." The Council of the Star Chamber condemned him to be whipped and pilloried and his "boldness in refusing to take a legal oath," without which many offenses might go "undiscovered and unpunished." (See 3 How. State Trials 1315, et seq.)

The whip that lashed "Freeborn John" smashed the Court of the Star Chamber as well. In July, 1641, Parliament abolished the Court of the Star Chamber, the Court of High Commission for Ecclesiastical Causes, and provided by statute that no ecclesiastical court could thereafter administer an *ex-officio* oath on penal matters. In 1645 the House of Lords set aside Lilburn's sentence and in 1648 Lilburn was granted £3000 reparation for the whipping which he had received.

Meanwhile, the scene of struggle against oaths *ex-officio* was carried to colonial America. The story is well told by R. Carter Pittman in 21 Virginia Law Rev. 763 from which the following quotations are taken:

[fol. 108] "The settlement of the English colonials in the new world took place at a time in English History when opposition to the *ex-officio* oath of the ecclesiastical courts was most pronounced, and at the period when the insistence upon the privilege against self-incrimination in the courts of common law had begun to have decided effect. \* \* \* The *ex-officio* oath, as employed in the ecclesiastical courts, which regulated the most intimate details of men's daily life, and more particularly by the Court of High Commission, was possibly the most hated instrument employed to create the unhappy plight of these Puritans and Separatists. \* \* \*

"About getting out of England there was much 'red tape' and it consisted in the most part of taking oaths—the oath of Supremacy and the oath of Allegiance, etc. For days and weeks thousands waited aboard ship in the river Thames until *this oath ordeal was over* and after that they were forced with a refined cruelty to say the prayers in the Anglican prayer books twice a day at sea. \* \* \*



The trial of Mrs. Ann Hutchinson before Governor Winthrop of Massachusetts in the year 1627 was recalled by Mr. Justice Black in *Adamson v. California*, 332 U.S. 46, when he commented at page 88:

"Mrs. Hutchinson was tried, if trial it can be called, for holding unorthodox religious views. People with a con-[fol. 109] suming belief that their religious convictions must be forced on others rarely ever believe that the unorthodox have any rights which should or can be rightfully respected. As a result of her trial and *compelled admissions*, Mrs. Hutchinson was found guilty of *unorthodoxy* and banished from Massachusetts. The lamentable experience of Mrs. Hutchinson and others, contributed to the overwhelming sentiment that demanded adoption of the *Constitutional Bill of Rights*. The founders of this Government wanted no more such 'trials' and punishments as Mrs. Hutchinson had to undergo. They wanted to erect barriers that would bar legislators from passing laws that encroached on the domain of belief, and that would, among other things, strip courts and *all public officers of a power to compel people to testify against themselves*." (Emphasis supplied.)

But the ingenuity of those who would use the oath against the unorthodox was undaunted.

See *Harrison v. Evans*, 1 English Reports, 1437, decided by the House of Lords in 1767. Evans was a Protestant Dissenter and this fact was known to the Lord Mayor of London. Nevertheless, the Mayor appointed Evans to fill a vacancy as sheriff, despite the existence of an act providing that no person should be admitted to any office who had not, within the twelve preceding months "received the sacrament of the Lord's Supper according to the rites of [fol. 110] the Church of England." Because of this statute Evans could not take the oath of office or assume it, and he was assessed for a statutory penalty of £600 which was made applicable to any citizen who refused to assume an office after being appointed thereto.

The House of Lords, by a 6 to 1 vote, ruled with the dissenting Evans, overturned the judgments of the lower courts and returned to him his £600.

"Test oaths, designed to impose civil disabilities upon men for their beliefs rather than for unlawful conduct were an abomination to the founders of this nation. This feeling was made manifest in Article VI of the Constitution which provides that *no religious test shall ever be required as a qualification to any office or public trust under the United States.*" (Black, J., dissenting In re Summers (1945), 325 U.S. 561, 576.) (Emphasis supplied.)

"No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, that the religious test oath or the restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing." (Emphasis supplied.) (Bridges v. California (1941), 314 U.S. 252 at 265.)

[fol. 111] It is revealing to note that test oaths and the struggle against them arose at a time when the division between church and state was in its early stages, when the separation was far from complete. The immunity from compulsory disclosure which ultimately developed affected not only the right of the individual to worship as he pleased but also his right, notwithstanding his place or mode of worship, to hold political office. The protection accorded religious belief developed hand in hand with non-sectarianism in government.

This policy has been recognized in the United States. While the original purpose behind the abolition of the test oath may have been to further religious liberty, the effect has been to extend political liberty. The following statement is illustrative: "This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience. Cf. *Pierce v. Society of Sisters*, 268 U.S. 158. Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of

human interest." (Thomas v. Collins, 323 U.S. 516, 531.)

The California 1897 Direct Primary Act permitted political parties to require persons, as a condition of voting at [fol. 112] the primary, to give an oath that they would thereafter support the nominees of that party. That statute was declared unconstitutional and the Supreme Court, in *Spier v. Baker* (1898), 120 Cal. 370, said at page 379:

"... And the moment you recognize the existence of power in the legislature to create tests in these primary elections, you recognize the right of the legislature to create any test which to that body may seem proper. While the test prescribed in this act may be said to be a most reasonable one, yet the right to make it carries with it the right to make tests most unreasonable. If the power rests in the legislature to create a test, then the power is found in a Democratic legislature to make the test at a primary election a belief in the free coinage of silver at the ratio of sixteen to one, and the same power is found in a Republican legislature to make the test a belief in the protective tariff. If such a power may be sustained under the constitution, then the life and death of political parties are held in the hollow of the hand by a state legislature."

In *Thomas v. Collins*, 323 U.S. 516, the same thought is expressed: "But it cannot be the duty; because it is not the right of the state to protect the public against false doctrine. The very purpose of the First Amendment is to free public authority from assuming a guardianship of the public mind through regulating the press, speech, [fol. 113] and religion. *In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.*" (Emphasis supplied.)

In the light of the foregoing discussion, let us consider the attacks made by plaintiff upon the oath here required. It is contended, with merit, that the oath here is unconstitutional in that it violates the equal protection clauses of both the federal and state Constitutions and that it also violates the First Amendment to the Constitution of the United States. Section 32 makes an exception insofar as the householder's \$100 exemption on personal property is concerned. While it cannot be denied that the Legisla-

ture in its wisdom may classify in order that certain evils may be avoided in the future, such classification must bear a reasonable relation to the evil to be avoided. There is here no reasonable classification when the evil to be avoided is considered. There is no evidence that any of the churches or veterans here involved advocated, or intended to advocate, the forbidden political philosophy. The constitutional amendment and section 32 appear to be a sort of shot gun attempt on the part of the Legislature to hit an undefined object. In other words, there is no relation between the object to be achieved and the tactics taken to achieve it. A statement made in the majority opinion clearly shows the fallacy in the entire affair. That statement reads as [fol. 114] follows: "By its enactment [section 19 of article XX] the people of this state declared the public policy of withholding from the owners of property in this state *who engage in the prohibited activities* the benefits of tax exemption. The denounced activities are criminal offenses under federal and state laws. They are prohibited by the act of Congress known as the Smith Act (54 Stat. 670) and by our state law (Stats. 1919, p. 281)." It should be emphatically stated and understood that not one of the churches or veterans here involved has been so much as accused of subversive activities. But through their refusal to take the unconstitutional (as I believe) oath, they are penalized in advance for something they have not done and will, in all probability, never do. By the majority opinion we are informed that the reason for the oath is to protect state revenues from impairment by those who would seek to destroy it by unlawful means. An entirely different situation would be presented had any of those involved sought to destroy the state, but here only future *highly problematical* activity is forsworn although the tax is levied for past ownership of property to which the exemption was applicable. Just why charitable institutions are singled out as presenting the greatest danger to this country in time of peace or war is not made clear in the majority opinion. It is Hornbook law that legislation classifying certain groups for corrective purposes must bear a reasonable relationship to the object to [fol. 115] be achieved. Churches would, indeed, seem to

me, to be the least likely subjects of classification for legislative measures to correct the evil thought to exist. Veterans, also, are those who have risked their lives or have been willing to risk them to uphold the ideals for which this country stands. The exemptions were granted, in the first instance, so that religious work might be carried on with the least amount of tax burden, possible to the end that the money saved thereby might be used to promote the general welfare; in the second instance, to veterans because they gave up homes, families, and positions to promote the general welfare insofar as protecting this country from an enemy was concerned. It hardly seems logical to assume that laws removing the tax exemptions from those dedicated to the promotion of the general welfare because they *might*, in the future, decide to do a turn-about-face and *destroy* the general welfare can be said to be a reasonable classification. If there is one principle that has always (heretofore) been clearly understood in this country it is that every person is presumed innocent until proven guilty beyond a reasonable doubt. The legislation involved here presumes that one refusing to sign the oath has been, or will soon be, guilty of treasonable conduct. From what is said in the majority opinion it appears that this thought did occur to the members of the court signing it. We are informed that there is a presumption of innocence *but* that the assessor, because of [fol. 116] it, is not relieved from making the investigation enjoined on him by law; that his administrative determination is not binding on the tax exemption claimant "but it is sufficient to authorize him to tax the property as non-exempt and to place the burden on the claimant to test the validity of his administrative determination in a court of law." What is this but forcing the supposedly subversive organization or person to prove *itself* or *himself* innocent beyond a reasonable doubt?

In testing the reasonableness of the laws under attack here, the next question which presents itself is why are householders excepted from those who must take the oath before any tax exemption is allowed them? We are told that the "segment of householders in this state is so



overwhelmingly large as compared with others chosen for exemption that the cost of processing them would justify their separate classification." If this class is so "overwhelmingly large" it would appear that if the old adage "in numbers lie strength" is true, that this class should also be required to take the oath prior to claiming the exemption. It would also appear that mere difficulty in "processing" would be of little moment in an undertaking thought to be so vitally necessary. Furthermore, if the principle behind the oath is, as we are told, to prevent those dangerous persons from depleting the state's revenues, it would appear that this "overwhelmingly large" [fol. 117] class might, even though the exemption is a relatively small one, deplete it even more than the revenues from those which fall within the legislation. The Supreme Court of the United States said (*Louisville Gas Co. v. Coleman*, 277 U.S. 32, 37) that "The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, *Kentucky Railroad Tax Cases*, 145 U.S. 321, 337; *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 293, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. *County of Santa Clara v. Southern Pac. R. Co.*, 18 Fed. 385, 388-399; *The Railroad Tax Cases*, 13 Fed. 722, 733. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated [fol. 118] alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415; *Air-way Corp. v. Day*, 266 U.S. 71, 85; *Schlesinger*



v. Wisconsin, 270 U.S. 230, 240. That is to say, *mere* difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U.S. 150, 155."

There is in my mind no doubt whatsoever that the legislation with which we are here concerned bears no relation whatsoever to the objective to be achieved. Presumably that objective is to stamp out, by any means at hand, the promulgation of unpopular ideas. While the idea of the overthrow of the government of this country by force and violence in either peace or war is as abhorrent to me as it is to the majority of Americans, I am at a complete loss when it comes to imagining any reasonable theory on which the legislation in question can be considered an effective way of preventing such action. The tax itself is on property owned by churches and used for religious purposes and the exemption applies only when such property is used for such purposes. So far as the veteran's exemption is concerned, the tax to which it applies is also on property. Property taxes and unpopular beliefs or advocacy would appear to be as far apart as the poles and to bear no reasonable relationship one to [fol. 119] the other. The classification here involved falls directly within the rule of the Louisville Gas case: it is arbitrary, it does not rest upon a difference bearing a reasonable and just relation to the act in respect to which the classification is proposed; it is a *mere* difference which "is not enough."

#### THE OATH IS A VIOLATION OF THE CONSTITUTIONAL GUARANTEE OF FREEDOM OF SPEECH:

In *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal. 2d 536, 542, we held that "Freedom of speech and of peaceable assembly are protected by the First Amendment of the Constitution of the United States against infringement by Congress. They are likewise protected by the Fourteenth Amendment against infringement by state Legis-

latures. (*Thomas v. Collins*, 323 U.S. 516, 530 [65 S. Ct. 315, 89 L. Ed. 430]; *De Jonge v. Oregon*, 299 U.S. 353, 364 [57 S. Ct. 255, 81 L. Ed. 278].) *However reprehensible a Legislature may regard certain convictions or affiliations, it cannot forbid them if they present 'no clear and present danger that they will bring about the substantive evils' that the Legislature has a right to prevent. 'It is a question of proximity and degree.'* (*Schenck v. United States*, 249 U. S. 47, 52 [39 S. Ct. 247, 63 L. Ed. 470].) The United States Supreme Court has been alive to the difference between remote dangers and substantial ones, between remote dangers and immediate ones. . . . [fol. 120] ' . . . Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be "substantial", Brandeis, J., concurring in *Whitney v. California*, *supra*, 274 U.S. at page 374; it must be "serious", *id.* 274 U.S. at page 376. And even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. . . . ' (Bridges v. California, 314 U.S. 252, 261, quoting from the concurring opinion of Mr. Justice Brandeis in *Whitney v. California*, 274 U.S. 357, 374.)

A reading of the majority opinion leaves in the minds of the reader the implication that the "clear and present danger" rule was abrogated by the later case of *Dennis v. U.S.*, 341 U.S. 494, 71 S. Ct. 857. In the *Dennis* case it was specifically noted by the court that in the Smith Act "Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged." It will be recalled that we have here *no evidence* that the churches and veterans involved were even so much as accused of the forbidden [fol. 121] activities. In the *Dennis* case the petitioners had been found guilty by a jury of organizing a Communist party in the United States; in knowingly and

wilfully teaching and advocating the overthrow of our government by force and violence. The court also held that it had been determined that the evidence amply supported the necessary finding of the jury that the petitioners "were unwilling to work within our framework of democracy, but intended to initiate a violent revolution whenever the propitious occasion appeared." In the majority opinion in the Dennis case it was said that "Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech" and speaking of the "clear and present danger" rule it was said "Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. *If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.*" (Emphasis added.) The court expressly rejected the contention that success or probability of success in overthrowing the government was the criterion. The court then, in speaking of prior cases, said that the court had not been "confronted with any situation comparable to the instant one—[fol. 122] the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis." The Supreme Court then stated the rule, relied upon by the majority here, that "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." This rule, following the court's language concerning what constituted a "clear and present" danger and read in the light of the facts as they were stated in the Dennis case, shows the absurdity of this tempest-in-a-teapot with which we are here confronted: there is no showing that the churches and veterans were highly organized into a war-like machine dedicated to the overthrow of the government by force and violence with leaders highly trained and ready to give the "word" when the time was ripe for revolution! The objects of the legislation, the objective

and the means used to achieve it are completely unrelated. Where is the "danger" so far as churches and veterans are concerned? And does the denial of a charitable exemption constitute a reasonable attempt to save this country from revolution? Or does the oath involved just constitute an unconstitutional invasion of freedom of speech? In my opinion it constitutes an unconstitutional invasion of freedom of speech with the absurdity of the entire situation pinpointed by the thought that any embryo revolutionist would surely not hesitate to subscribe to such an oath.

[fol. 123] As Mr. Justice Douglas said in his dissenting opinion in the Dennis case, "Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilization apart.

"Full and free discussion has indeed been the first article of our faith. We have founded our political system on it. It has been the safeguard of every religious, political, philosophical, economic, and racial group amongst us. We have counted on it to keep us from embracing what is cheap and false; we have trusted the common sense of our people to choose the doctrine true to our genius and to reject the rest. This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor. We have wanted a land where our people can be exposed to all the diverse creeds and cultures of the world.

"There comes a time when even speech loses its constitutional immunity. Speech innocuous one year may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic. That is the meaning of the clear and present danger test. When conditions are so critical that there will be no time to avoid [fol. 124] the evil that the speech threatens, it is time to call a halt. Otherwise, free speech which is the strength of the Nation will be the cause of its destruction.

"Yet free speech is the rule, not the exception. The restraint to be constitutional must be based on more than

fear, on more than passionate opposition against the speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed."

Mr. Justice Douglas said that "If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality. This case was argued as if those were the facts. The argument imported much seditious conduct into the record. That is easy and it has popular appeal, for the activities of Communists in plotting and scheming against the free world are common knowledge. But the fact is that no such evidence was introduced at the trial." The books on Leninism and Communism, etc., which were involved in the Dennis case were commented on by Mr. Justice Douglas as follows: [fol. 125] "Those books are to Soviet Communism what *Mein Kampf* was to Nazism. If they are understood, the ugliness of Communism is revealed, its deceit and cunning are exposed, the nature of its activities becomes apparent, and the chances of its success less likely. That is not, of course, the reason why petitioners chose these books for their classrooms. They are fervent Communists to whom these volumes are gospel. They preached the creed with the hope that some day it would be acted upon." Mr. Justice Douglas then continued: "The vice of treating speech as the equivalent of overt acts of a treasonable or seditious character is emphasized by a concurring opinion [Mr. Justice Jackson], which by invoking the law of conspiracy makes speech do service for deeds which are dangerous to society. . . . I repeat that we deal here with speech alone, not with speech *plus* acts of sabotage or unlawful conduct. Not a single seditious act is charged in the indictment. To make a lawful speech unlawful because two men conceive it is to raise the law of conspiracy to appalling proportions. That course is to make a radical



break with the past and to violate one of the cardinal principles of our constitutional scheme."

I repeat that in the case at bar we haven't even had speech let alone any facts. Neither prejudice nor hate nor senseless fear should be the basis for abridging freedom [fol. 126] of speech. "Free speech—the glory of our system of government—should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent."

American democracy is no accident; it is the majestic product of a vigorous, experimental and passionate history. This nation came into existence as the result of a purposeful struggle against governmental tyranny. The heritage of Thomas Jefferson—"Rebellion to Tyrants is obedience to God"—remains with us, embodied in our institutions and traditions. The spirit of Inquisition, which was abjured in the Declaration of Independence, has always been obnoxious to our political and social life. Equally, it has found no tolerance in our legal codes, our legal traditions, our juridical morality. Due process has meant a fair, legal process. Liberty has meant genuine, concrete liberty for the individual citizen—his right to freedom from search and seizure, his right to privacy, his right to be free of persecutory inquisition on grounds of race, color, creed, political opinion or association.

At this truly grave moment in our nation's growth it is in the power of this court to speak forthrightly in the language of Coke, Camden, and Bradley, in the language of the many illustrious jurists for whom the frenzy of the political market place never blurred the meaning of freedom. [fol. 127] "Under our constitutional system courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement. . . . No higher duty, nor more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion." (*Chambers v. Florida*, 309 U.S. 227, 241 (1940).)



What is required at this moment of this court is not innovation, but rather a restatement of the glowing principles by which the history of the western world has given dignity to its citizens: "Historical liberties and privileges are not to bend from day to day because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price." (Cardozo, J., *Matter of Doyle*, 257 N.Y. 268.)

The issue is momentous, of far-reaching implication, and the ruling of the court will be a categorical imperative whose cumulative effect will be seen only in the fullness of [fol. 128] time. "Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole. The dangers are not fanciful. We too readily forget them. Recollection may be refreshed as to the happenings after the first World War by the 'Report Upon the Illegal Practices of the United States Department of Justice,' which aroused the public concern of Chief Justice Hughes (then at the bar), and by the little book entitled 'The Deportations Delirium of Nineteen-Twenty' by Louis F. Post, who spoke with the authoritative knowledge of an Assistant Secretary of Labor." (Frankfurter, J., dissenting, *Harris v. U. S.* (1947), 331 U.S. 145, 173.)

Devotion to Americanism often calls for something other than conformity. The plaintiff in the present case knew that to protect the Constitution, indeed merely to invoke its protection for all Americans, required courage, and that hardihood to challenge a wrong done under color of authority was as indispensable to good citizenship as would be, in other circumstances, unquestioning obedience. President Thomas Jefferson wrote to Benjamin Rush in a letter dated April 21, 1803: "It behooves every man who values liberty of conscience for himself, to resist invasions of it in the case of others; or their case may, by change of circumstances, become his own. *It behooves him, too, in his own case to give* [fol. 129] *no example of concession, betraying the common right of independent opinion, by answering questions of*

*faith* which the laws have left between God and himself." (Emphasis supplied.)

In the last analysis, when the moment of decision comes, to the private citizen as well as to the judge, it is in the quiet of his own mind and in the glow of his own courage that Americanism thrives. And it is in the cumulative decision of millions, citizen as well as official, that Americanism is reborn each moment.

For the foregoing reasons, I would reverse the judgment.

Carter, J.

[fol. 130]

[File endorsement omitted]

Order Due May 24, 1957

L.A. No. 23847

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA,  
IN BANK

[Title omitted]

ORDER DENYING REHEARING—Filed May 22, 1957

Appellant's petition for rehearing DENIED.

Gibson, C.J., Carter J., & Traynor J. are of the opinion that the petition should be granted.

Gibson, Chief Justice.

(Petition for rehearing filed May 7, 1957.)

[fol. 131] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 132] SUPREME COURT OF THE UNITED STATES

No. 382—October Term, 1957

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THE FIRST UNITARIAN CHURCH OF LOS ANGELES,  
a corporation, Petitioner,

v.

COUNTY OF LOS ANGELES, CITY OF LOS ANGELES, H. L. BYRAM,  
COUNTY OF LOS ANGELES TAX COLLECTOR, ET AL.

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ORDER ALLOWING CERTIORARI—October 21, 1957

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted. The case is consolidated with No. 385 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

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# **TRANSCRIPT OF RECORD**

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**Supreme Court of the United States**

**OCTOBER TERM, 1957**

**No. 385**

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**VALLEY UNITARIAN-UNIVERSALIST CHURCH,  
INC., PETITIONER,**

**vs.**

**COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF  
LOS ANGELES, CALIFORNIA; H. L. BYRAM,  
COUNTY TAX COLLECTOR**

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**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF CALIFORNIA**

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**PETITION FOR CERTIORARI FILED AUGUST 20, 1957  
CERTIORARI GRANTED OCTOBER 21, 1957**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 385

VALLEY UNITARIAN-UNIVERSALIST CHURCH,  
INC., PETITIONER,

vs.

COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF  
LOS ANGELES, CALIFORNIA; H. L. BYRAM,  
COUNTY TAX COLLECTOR

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

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[fol. 1]

**IN THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, IN AND FOR THE COUNTY OF  
LOS ANGELES**

No. 637353

---

**THE PEOPLE'S CHURCH OF SAN FERNANDO VALLEY, INC.,  
Plaintiff,**

**v.**

**COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF LOS ANGELES,  
CALIFORNIA; H. L. BYRAM, COUNTY TAX COLLECTOR,  
Defendants.**

---

**COMPLAINT TO RECOVER TAXES PAID UNDER PROTEST AND FOR  
DECLARATORY JUDGMENT—Filed December 9, 1954**

**Plaintiff alleges:**

**I**

Plaintiff, The People's Church of San Fernando Valley, Inc., is now and was at all times herein mentioned a religious corporation organized under the laws of the State of California, with its principal place of worship and business at and within the City of Los Angeles, County of Los Angeles, State of California.

**II**

Defendant, County of Los Angeles, is, and at all times herein mentioned was, a body corporate and politic of and within the State of California and a duly organized and existing County of and within said state under and pursuant to the laws of said state.

**III**

Defendant, City of Los Angeles, is now and was, at all [fol. 2] times herein mentioned, a municipal corporation duly organized and existing under the laws of the State of California and located within the County of Los Angeles.

## IV

Defendant, H. L. Byram, is the duly elected and acting Tax Collector for the County of Los Angeles and also authorized to collect taxes for the City of Los Angeles.

## V

Plaintiff is now and at all times herein mentioned was the owner of the following described real property located in the City of Los Angeles, County:

Tract No. 9865, Lots 2, 3 and 4 as per Book 905, Page 311 of Maps, Records of Los Angeles County, commonly known as 14933 Victory Blvd., Van Nuys, California.

There is located on said real property a church building used solely and exclusively for religious worship. Said building is not rented for religious purposes and rent received by the owner thereof. All of the above described real property is required for the convenient use and occupation of said building.

## VI

The above facts alleged in Paragraph V at all times herein mentioned were publicly well known and known to the Tax Assessor and defendant Tax Collector of defendant County, and were so known as of the first Monday of March, 1954, and at all times subsequent thereto.

## VII

By reason of said facts alleged in Paragraph V, plaintiff is entitled to the exemption stated in Article XIII, Section 11½ of the California Constitution for said real property and said building.

## VIII

On or about April 21, 1954, plaintiff filed in the office of John R. Quinn, County Assessor of Los Angeles County, a [fol. 3] church exemption claim statement, furnished by

said assessor, for the year 1954, showing that it was entitled to the exemption of Article XIII, Section 1½ of the California Constitution.

Said church claim statement was complete in every respect except that plaintiff struck therefrom the oath set forth in Section 32 of the Revenue and Taxation Code reading as follows: "That applicant does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign Government against the United States in the event of hostilities."

Plaintiff declined to execute the said declaration containing said language for the reason that the requirement thereof is null and void as will be more fully set forth hereafter.

## IX

Thereafter the County Assessor denied said claim for exemption and assessed for taxes for the said year all of the above set forth real property and the church building thereon. The property was assessed at the following valuations:

|              |      |
|--------------|------|
| Land         | 2600 |
| Improvements | 3820 |

which assessment in said amount was charged by the County Assessor to plaintiff upon the assessment roll of the defendant County for said year.

## X

Thereafter, based on said assessment, the County Tax Collector sent to plaintiff a tax bill for the year 1954 demanding payment of taxes in the amount of \$432.72 of which \$216.36 was the first installment due November 1, 1954 and the delinquency date December 10, 1954 and the second installment in the amount of \$216.36 will be due on February 1, 1955 and delinquency date, April 10, 1955. Said tax was entered on the rolls of said County for said year as a tax and lien upon and against said real property [fol. 4] and said church building situated thereon.

## XI

Thereafter, on or about December 8, 1954, plaintiff paid said first installment under protest as provided by Revenue and Taxation Code 5136, filing the written protest in the form and manner required by Revenue and Taxation Code 5137. Said protest is referred to herewith, incorporated herein as though fully set forth and a copy thereof attached hereto as Exhibit "A".

## XII

The whole of said assessment is void for each and all of the reasons set forth in the protest, Exhibit "A" attached hereto.

## XIII

Based upon the above facts there is a genuine controversy between plaintiff and defendants. In said controversy, plaintiff claims that the denial to plaintiff of the church exemption of Article XIII, Section 1½ is illegal for the reasons above set forth. On the other hand, plaintiff is informed and believes, and therefore alleges, defendants claim that the denial of said exemption is legal and valid.

Wherefor, plaintiff prays:

1. For judgment in the sum of \$216.36 plus interest at the rate of 5% from December 8, 1954;
2. For a decree declaring the rights and duties of the parties and declaring that the denial to plaintiff of the exemption of Article XIII, Section 1½ of the California Constitution is illegal and void and the tax demanded against plaintiff without said exemption is illegal and void;
3. For costs of suit incurred herein;
4. For such other and further relief as to the Court [fol. 5] may seem just and proper.

Wirin, Rissman & Okrand, by A. L. Wirin, by Fred Okrand, Attorneys for Plaintiff.

[fol. 6]

## EXHIBIT A TO COMPLAINT

People's Church of San  
Fernando Valley, Inc.  
14933 Victory Boulevard  
Van Nuys, California

December 8, 1954

H. L. Byram, County Tax  
Collector  
Hall of Justice  
Los Angeles 12, California

Dear Sir:

Enclosed please find check in the sum of \$216.36 in payment of first installment on 1954-1955 real property taxes assessed on the property of the undersigned Church (Tract No. 9865, Lots 2, 3 and 4) as per your bill (Code Area 4, Parcel No. 90531113).

Please take notice that payment herein is under protest. It is claimed that the whole assessment is void.

The grounds on which the claim is founded are these:

1. The above real property and building of The People's Church of San Fernando Valley is entitled to the exemption of Article XIII, Section 11½ of the California Constitution.

2. On or about April 21, 1954 the Church returned to the assessor's office the completed church exemption claim statement for the year 1954. Said statement was completely filled out with the exception that the declaration with reference to advocacy referred to in Revenue and Taxation Code Section 32 was stricken out on grounds of conscience. It is for this reason the Church was not given the tax exemption this year. Said action in denying the exemption is null and void for the reason that on their face, and as applied, said [fol. 7] declaration, as well as Section 32 of the Revenue and Taxation Code, as well as Article XX, Section 19 of the California Constitution, violate the Constitution as follows:

a. The freedom of religion guarantees and the principal of the separation of church and state of the 1st and 14th Amendments to the United States Constitution.

b. The freedom of speech and assembly guarantees of the 1st and 14th Amendments to the United States Constitution;

c. The due process clause of the 14th Amendment to the United States Constitution because of being arbitrary, capricious and bearing no reasonable relation to the public welfare;

d. The due process clause of the 14th Amendment because of being vague, indefinite and uncertain;

e. The equal protection clause of the 14th Amendment, and the freedom of religion guarantees of the 1st and 14th Amendments to the United States Constitution by giving preference to those churches whose members by reason of conscience, conviction and belief are able to subscribe to such a declaration as against the undersigned church whose members by reason of conscience, conviction and belief are not able to subscribe to such an oath or countenance its exaction.

3. Section 32 of the Revenue and Taxation Code goes beyond the authority given the legislature by Article XX, Section 19, of the California Constitution. Accordingly, said Section 32 on its face and as applied, in addition to being violative of the United States Constitution as above set forth, contravenes the California Constitution as follows:

a. The failure to sign the declaration required by [fol.8] said section is no ground for denying tax exemption under Article XX, Section 19;

b. The legislature has no power to deny the tax exemption given by Article XIII, Section 11½;

c. The freedom of religion guarantee and the guarantee of no discrimination or preference of Article I, Section 4;



d. The freedom of speech and assembly guarantees of Article I, Sections 9 and 10;

e. The due process clause of Article I, Section 13;

f. The equal protection guarantees of Article I, Sections 11 and 21 and Article IV, Section 25, Tenth, Nineteenth and Twentieth;

g. Article XX, Section 19 itself which permits of no exceptions from its terms.

4. In the face of the freedom of religion guarantees of both the Federal and State Constitutions, California Constitution, Article XX, Section 19 and Revenue and Taxation Code Section 32 should not be construed as applying to churches.

5. The Constitutional Amendment which became Article XX, Section 19 of the California Constitution and said Article XX, Section 19, are null and void because they embrace more than one subject, contrary to Article IV, Section 1c of the California Constitution.

Sincerely yours,

Carl Olson, Treasurer, People's  
Church of San Fernando Valley,  
Inc.

[fol. 10] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

No. 637353

[Title omitted]

DEMURRER—Filed December 28, 1954

Defendants demur to the complaint herein on the ground that the same does not state facts sufficient to constitute a cause of action.

Harold W. Kennedy, County Counsel, by /s/ Gerald G. Kelly, Assistant County Counsel, and /s/ Gordon Boller, Deputy County Counsel, Attorney for defendants, County of Los Angeles and H. L. Byram, County Tax Collector.

Roger Arnebergh, City Attorney, by /s/ Spencer L. Halverson, Deputy City Attorney, Attorney for City of Los Angeles.

[fol. 12] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

No. 637353

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—  
Filed April 6, 1955

The above entitled matter having come before the Superior Court of Los Angeles, Department 48, the Honorable Philbrick McCoy, presiding, on the 24th day of March, 1955, for hearing on defendants' demurrer to the complaint and for trial, plaintiff having appeared by its attorneys, Wirin, Rissman and Okrand, by A. L. Wirin and Hugh R. Manes, and the defendants having appeared by their attorneys, Harold W. Kennedy, County Counsel, Gerald G. Kelley and Gordon Boller, Deputy County Counsel and Roger Arnebergh, City Attorney and Spencer L. Halverson, Deputy City Attorney, and the court having by stipulation received in evidence the copy of the property statement form and the receipted tax bill attached to the demurrer, and it having been stipulated by respective counsel that if the court should overrule the demurrer, judgment in favor of plaintiff might be entered forthwith, and good [fol. 13] cause appearing therefor, the court overrules the demurrer and makes the following:

## FINDINGS OF FACT

### I

The allegations of fact contained in plaintiff's complaint, paragraphs I through and including paragraph XI, on file herein, are true.

From the above stated Findings of Fact, the court makes the following:

## CONCLUSIONS OF LAW

### I

Article XX, Section 19 of the Constitution of the State of California, and Section 32 of the California Revenue and Taxation Code do not violate the First Amendment or the Fourteenth Amendment of the Federal Constitution in that they do not involve an establishment of religion by the state, nor do they deprive plaintiff of religious liberty or freedom of speech.

### II

Section 32 of the California Revenue and Taxation Code is unconstitutional in that it violates Article XX, Section 19 of the Constitution of the State of California because the legislature had no authority to exclude or exempt householders from the enforcing provisions thereof, nor otherwise limit the enforcing provisions thereof, nor otherwise limit the enforcing requirements to taxes on property.

### III

Plaintiff is entitled to the tax exemption provided in Article III, Section 1½ of the Constitution of the State of California, and is entitled to recover the sum of \$216.36, together with interest at the legal rate of 5% from December 8, 1954, and the costs of suit incurred herein.

Dated: This 6th day of April, 1955.

Philbrick McCoy, Judge of the Superior Court.

Approved as to form, Harold W. Kennedy, County Counsel,  
by Gordon Boller, Deputy County Counsel.

[fol. 14] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

No. 637353

THE PEOPLE'S CHURCH OF SAN FERNANDO VALLEY, INC.,  
Plaintiff,

v.

COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF LOS ANGELES,  
CALIFORNIA; H. L. BYRAM, COUNTY TAX COLLECTOR,  
Defendants.

JUDGMENT—April 6, 1955

The above entitled matter having come before the Superior Court of Los Angeles, Department 48, the Honorable Philbrick McCoy, presiding, on the 24th day of March, 1955, for hearing on defendants' demurrer to the complaint and for trial, plaintiff having appeared by its attorneys, Wirin, Rissman and Okrand, by A. L. Wirin and Hugh R. Manes, and the defendants having appeared by their attorneys, Harold W. Kennedy, County Counsel, Gerald G. Kelley and Gordon Bolter, Deputy County Counsel and Roger Arnebergh, City Attorney and Spencer L. Halverson, Deputy City Attorney, and the court having by stipulation received in evidence the copy of the property statement form and the receipted tax bill attached to the demurrer, and having heard and considered argument made by respective counsel, the matter having been thereafter submitted to the court for decision and the court having made and entered its [fol. 15] Findings of Fact and Conclusions of Law in the matter herein, and good cause appearing therefor,

It Is Hereby Ordered that Judgment be entered in favor of plaintiff; that plaintiff is entitled to the sum of \$216.36 and for costs in the amount of \$

Dated: This 6th day of April, 1955.

Philbrick McCoy, Judge of the Superior Court.

Approved as to form, Harold W. Kennedy, County Counsel, by Gordon Bolter, Deputy County Counsel.

[fol. 16] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

No. 637353

THE PEOPLE'S CHURCH OF SAN FERNANDO VALLEY, INC.,  
Plaintiff,

v.

COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF LOS ANGELES,  
CALIFORNIA; H. L. BYRAM, COUNTY TAX COLLECTOR,  
Defendants.

NOTICE OF APPEAL—Filed May 16, 1955

To the Clerk of the above entitled Court and to plaintiff  
The People's Church of San Fernando Valley, Inc., and to  
its attorneys Wirin, Rissman & Okrand:

Please Take Notice that the defendants County of Los  
Angeles, City of Los Angeles, and H. L. Byram, County Tax  
Collector, in the above entitled action hereby appeal to the  
Supreme Court of the State of California, from that certain  
judgment entered herein on April 8, 1955, in Book 2886,  
page 164 of Judgments, in favor of the plaintiff and against  
the defendants above named.

Dated this 16th day of May, 1955.

Harold W. Kennedy, County Counsel, Gerald G.  
Kelly, Assistant County Counsel, Gordon Boller,  
Deputy County Counsel, Wm. E. Lamoreaux,  
Deputy County Counsel, By /s/ Wm. E. Lamo-  
reaux, Attorneys for Defendants.

[fol. 17] Stipulation Designating Record on Appeal  
omitted in printing.

[fol. 19] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES .

EXHIBIT TO STIPULATION

TEXT OF JUDGE McCOY'S RULING  
IN CHURCH LOYALTY OATH SUIT

Following is the transcription of an oral opinion by Superior Judge Philbrick McCoy, holding Section 32 of the Revenue and Taxation Code unconstitutional. The jurist ruled on March 24 that the People's Church of San Fernando Valley, Inc. was entitled to a refund of taxes paid under protest after refusal to sign a loyalty oath.

Appearances were Wirin, Rissman & Okrand by A. L. Wirin and Hugh R. Manes for plaintiff church; Harold W. Kennedy, County Counsel by Gerald G. Kelly and Gordon Boller for defendants County of Los Angeles and H. L. Byram, County Tax Collector; and Roger Arnebergh, City Attorney, by Spencer L. Halverson for defendant City of Los Angeles.

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No. 637,353

THE PEOPLE'S CHURCH OF SAN FERNANDO VALLEY INC. vs.  
COUNTY OF LOS ANGELES, ET AL.

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McCoy, J.—(orally from the bench):

I have reached a conclusion in this matter and will state it at this time. Ever since this matter came over to me on Law and Motion calendar three weeks ago I have given it very serious thought. I have read with a great deal of interest the briefs filed on both sides. I am inclined to think that I would know little more about it if I studied and restudied it for another period of weeks than I do now. At least the matter is fresh in my mind. I do not propose to follow *Speiser vs. Randall* (unreported) (No. 60660, decided February 9, 1955 by a five judge Superior Court.)



The matter comes before the Court on the Demurrer to the Complaint filed by the People's Church of San Fernando Valley to recover certain taxes paid under protest by reason of the alleged unconstitutionality of Article XX, Section 19 of the Constitution of the State of California and Section 32 of the Revenue and Taxation Code of the State which was adopted by the Legislature in an attempt to implement the constitutional provision. The problems relating to these two provisions are in part the same. I have tried to equate the advocacy of the overthrow of the Government of the United States or the State by force or violence, or any other unlawful means, or the advocacy of the support of a foreign government against the United States in the event of hostilities, with the guarantees of the First Amendment of the Constitution of the United States. More narrowly, I have attempted to equate such advocacy with religious belief or freedom of religion, because neither of these enactments that we have to consider, in my mind, have anything to do with an establishment of religion, or the establishment of a religion, but rather with religious belief. But I simply cannot find that any such advocacy as is proscribed by Section 19 of Article XX has any relation whatsoever to a religious belief. Neither do I find, nor can I conclude, that either type of advocacy can possibly be related to the free exercise of religion under the First Amendment.

Now, let me amplify that a little bit. The Constitutional Amendment provides that: "Notwithstanding any other provision of this Constitution, no person or organization" who advocates either of these things shall receive any exemption from any tax imposed by this State, or any of its subdivisions. The Legislature didn't enact that; the people did. I am not going to undertake to define the nature of taxes; but basically, the tax is on some property right, whatever form the tax may take, and basically, taxes are imposed as a means of raising revenue. The plaintiff relies extensively in its brief on *Murdock v. Pennsylvania*, 319 U. S. 105, and more particularly the statement by Mr. Justice Douglas at page 112, for the majority, that those who can tax the exercise of a religious practice can make

its exercise so costly as to deprive it of the resources necessary for its maintenance. I agree. But the *Murdock* case, the *Follett* case, (*Follett v. Town of McCormick*, 321 U.S. 573), the *Jones* case (*Jones v. Opelika*, 316 U.S. 584, Rev'd, 319 U.S. 103) and the *Busey* case (*Busey v. District of Columbia*, 319 U.S. 579), involve situations which led our District Court of Appeal, Fourth District, to say that those cases hold "that distribution of religious literature in return for money, when done as a method of spreading the distributor's religious beliefs is an exercise of religion within the First Amendment, and is immune from interference by the requirement of a license," tax, or whatever you please. (*City of Corona v. Corona etc. Independent*, 115 C.A. 2d 382, 384). The tax in such cases has a direct impact on the distribution, the dissemination by word of mouth, or otherwise, of the religious practitioner's religious beliefs, and is therefore unconstitutional.

But there is a good deal more to the *Murdock* case than what I have just referred to. Mr. Justice Douglas also said at page 112 in striking down the tax there in question:

"We do not mean to say that religious groups and the press are free from all financial burdens of government." (Citing: *Grosjean v. American Press Co.*, 297 U.S. 233.)

And Mr. Justice Reed in a dissenting opinion amplified that statement, and did not disagree with Mr. Justice Douglas:

"It will be observed" (said Mr. Justice Reed at page 127) "that there is no suggestion of freedom from taxation, and this statement is equally true of the other state constitutional provisions. It may be concluded that neither in the state or the federal constitutions was general taxation of church or press interdicted.

"Is there anything in the decisions of this Court which indicates that church or press is free from the financial burdens of government? We find nothing. Religious societies depend for their exemptions from taxation upon state constitutions or general statutes, not upon the Federal Constitution. This Court has

held that the chief purpose of the free press guarantee was to prevent previous restraints upon publication."

He cites, at page 128, this further comment from the Grosjean case:

"It is not intended by anything we have said to suggest that the owners of newspapers are immune from many of the ordinary forms of taxation for the support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press." *Grosjean v. American Press Co.*, supra at page 250.

Now let's go back to Mr. Justice Reed's statement: "Religious societies depend for their exemptions from taxation upon state constitutions or general statutes, not upon the Federal Constitution," (Justice Reed, dissenting, *Murdock v. Pennsylvania*, supra, at page 128). We are dealing here, it seems to me, with a matter of an exemption from taxation under the state Constitution, which does not depend upon the federal law or the federal Constitution. Portions of Mr. Justice Reed's opinion which I have just read suggest, and I think it is true, that there is a close relationship between freedom of religion, or the free exercise of religion and the freedom of speech under the First Amendment. Both are fundamentally essential in a free nation.

I adverted a moment ago to the decision by our District Court of Appeal in *City of Corona v. Corona Daily Independent* 115 Cal. App. (2d) 382, in which the Court, speaking through Justice Griffin reviewed at length the *Murdock* and many other cases, and noted "that religious societies depend for their exemptions from taxation upon state constitutions or general statutes, and not on the provisions of the federal Constitution," paraphrasing the *Murdock* case, at page 385.

"There is ample authority," the court said "to the effect that newspapers and the business of newspaper publication are not made exempt from the ordinary forms of taxes for the support of local government by the provisions of the United States." *City of Corona v. Corona Daily Independent*, supra, at page 387.

Now, it would seem to me that if newspapers are not made exempt from the ordinary forms of taxes, then the churches or other religious institutions are not exempt from the ordinary forms of taxes for the support of local government by the provisions of the First and Fourteenth Amendment.

"The guarantees of the constitution and bill of rights in favor of the freedom of the press, freedom of speech, and personal liberty," said the Supreme Court of Virginia, "were never intended to restrict the right of taxation for the support of the government. If these guarantees did restrict the power of taxation, the government would soon be insolvent, and powerless to furnish the protection claimed." (*City of Norfolk v. Norfolk Landmark Publishing Co.*, (1898) 95 Va. 564, 28 S.E. 959, at p. 960).

To hold, as I do, that the provisions of Section 19, Article XX of the Constitution of the State of California can be squared with the First Amendment solves only half of the problem. If advocacy without overt acts is a sufficient reason, as the cases so hold in substance, to preclude participation in government through holding public office, (*Garner v. Board of Public Works*, 341 U.S. 716; *Adler v. Board of Education*, 342 U.S. 485; *Pockman v. Leonard*, 39 Cal. 2d 676; *Parker v. County of Los Angeles*, 88 C.A. 2d 481), or to preclude admission to the bar, which is a franchise or privilege granted by the state, (*In re Summers*, 325 U.S. 561) then it seems to me that such advocacy is sufficient to preclude the receipt of other benefits of government. In this case the Constitution applies this rule to those who may claim exemption from taxation. I find nothing wrong with that. There is nothing in either the Constitution or the legislation which puts any limit on what a church may preach, teach or advocate. I find nothing unconstitutional in the fact that Section 32 requires a declaration of non-advocacy to be filed by those claiming tax exemptions. That is a proper evidentiary device to establish *prima facie* a fact peculiarly within the knowledge of the declarant.

What does bother me, however, is something much more substantial than that. Granted that Article XX, Section 19

of our Constitution meets the test of constitutionality as measured by the First Amendment to the Constitution of the United States, it applies in its terms to all taxpayers: "Notwithstanding any other provision of this Constitution, no person or organization . . . shall receive any exemption from any tax." As suggested by defendants, this provision qualifies all exemptions theretofore and otherwise granted by any other provisions of the Constitution. It seems to me that by adopting Section 19 of Article XX of the Constitution, the People themselves made their own classification for tax purposes and precluded all other possible classifications. Therein it is unlike Section 11 of Article XIII, for instance, which provides that:

"Income taxes may be assessed to and collected from persons, corporations, joint-stock associations, or companies resident or doing business in this State, or any one or more of them, in such cases and amounts, and in such manner, as shall be prescribed by law."

That was an open door to the Legislature to establish proper classifications. Here, however, the Legislature had no authority to make any classification which was not as all-inclusive as that of section 19 of Article XX.

The argument is suggested that the Constitution authorized the legislation now under attack by providing: "The Legislature shall enact such laws as may be necessary to enforce the provisions of this section." But the word "necessary" was not there used in the sense in which the defendants make their point. That provision can only mean all laws necessary to carry out *all* of the provisions of this section." I find no authority in the Constitution to legislate on a piecemeal basis, any more than they have authority to make any other classification.

It is perhaps significant but not controlling to note that Section 8 of Article XIII already prescribes what is to be contained in a declaration of property for tax purposes:

"The Legislature shall by law require each taxpayer in this State to make and deliver to the county assessor, annually, a statement, under oath, setting forth specifically all the real and personal property owned by such

taxpayer, or in his possession or under his control, at 12 o'clock meridian, on the first Monday of March."

That section was not amended when section 19 of Article XX was adopted. I doubt if it occurred to the draftsmen of Section 19, Article XX, on the one hand, or to the Legislature in enacting Section 32 of the Revenue and Taxation Code that another provision of the Constitution fixed the terms of the declaration that must be filed for tax purposes. It is interesting, as I say, but not necessarily controlling.

In enacting section 32 of the Revenue Code the Legislature, in my judgment exceeded its constitutional authority. Having fixed authority to carry out the fixed purpose of the Constitution and provide by law the means necessary to enforce the provision of the Constitution which prevents every person and every organization within the proscribed class from receiving tax exemption, nevertheless, they adopted a law which says that: "Any statement, return, or other document in which is claimed any exemption, other than the householder's exemption, from any property tax imposed by this State" shall file such a declaration. The constitutional provision is not limited to property taxes. It is broad enough to include any tax imposed by the State. The constitutional provision does not except householders or any other taxpayers, nor does it except any kind of taxes. The Legislature undertook to make such exceptions. On the one hand householders are excepted from its operation; on the other it is limited to property taxes. Since the Legislature has therein exceeded its constitutional authority, the demurrer is overruled.

Now, if the Legislation is unconstitutional, then, as I see it, the plaintiff is entitled to relief under the stipulation, and hence will be entitled to judgment.

*Reprint From*

**METROPOLITAN NEWS**

Friday,

April 8, 1955

135 N. Broadway      MUtual 4384      Los Angeles 12, Calif.



[fol. 20]

[File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF LOS ANGELES

No. 637353

[Title omitted]

STIPULATION IN LIEU OF REPORTER'S TRANSCRIPT—  
Filed May 16, 1955

It Is Hereby Stipulated between the parties hereto, by their respective attorneys, that at the time set for hearing in the above entitled Court of the Defendants' Demurrer herein, it was stipulated orally in open court that the plaintiff's complaint may be amended, and may be deemed amended by attaching to said complaint a photostatic copy of the property statement assessment form, pertaining to the plaintiff, as Exhibit I, and the receipted tax bill, relating to the plaintiff, as Exhibit II.

Said Exhibit I and Exhibit II are attached hereto and incorporated herein.

It Is Further Stipulated that at said time it was orally stipulated in open Court that the plaintiff's complaint raises no issues of fact, and that the defendant does not controvert any of the allegations of fact in the complaint; and intends [fol. 21] to file not (sic) answer; and in the event the court should overrule the Defendants' Demurrer, judgment may be entered for the plaintiff.

This stipulation is entered into in lieu of the reporter's transcript of the proceedings at said time.\*

Dated: This 16th day of May, 1955.

Wirin, Rissman & Okrand, A. L. Wirin & Hugh R. Manes, by /s/ A. L. Wirin, Attorneys for Plaintiff.

Harold W. Kennedy, County Counsel, Gerald G. Kelly, Assistant County Counsel, Gordon Boller, Deputy County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, by /s/ Wm. E. Lamoreaux, Attorneys for Defendants.

[fol. 23] Clerks' Certificates to foregoing transcript omitted in printing.

[fol. 28]

[File endorsement or added]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA  
IN BANK

L. A. 23790

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THE PEOPLE'S CHURCH OF SAN FERNANDO VALLEY, INC.,  
Plaintiff and Respondent,

v.

COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF LOS ANGELES,  
CALIFORNIA; H. L. BYRAM, COUNTY TAX COLLECTOR,  
Defendants and Appellants.

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OPINION—Filed April 24, 1957

This is an appeal by the defendants from a judgment for the plaintiff in an action to recover taxes paid under protest and for declaratory relief.

The plaintiff is a church organization owning real property within the jurisdiction of and subject to taxation by the County and City of Los Angeles. Within the time prescribed by law for the tax year 1954-1955, the plaintiff filed a property statement and an application for the tax exemption authorized by section 1½ of article XIII of the Constitution. [fol. 29] The application was made on the regular affidavit form provided by taxing officials of the defendant county. Among other things the form provided for a statement under oath that the applicant did not advocate the violent overthrow of the local or federal government nor the support of a foreign government in the event of hostilities. The oath is required by the provisions of section 32 of the Revenue and Taxation Code adopted in 1955 to implement section 19 of article XX of the Constitution. The plaintiff refused to execute the oath and its property was assessed in the same manner as non-exempt property. The plaintiff paid the first installment of its taxes under protest, and commenced this action to recover the same.

The plaintiff contends that both section 19 of article XX of the Constitution and section 32 of the Revenue and Taxation Code are invalid for the reasons urged by the plaintiff in the case of *The First Unitarian Church of Los Angeles v. County of Los Angeles*, ante, p. . The trial court properly concluded that section 19 of article XX of the state Constitution did not violate any provision of the federal Constitution, but held that the application for exemption was improperly denied because section 32 of the Revenue and Taxation Code was invalid. Its decision followed from its conclusion that the Legislature, in enacting that section, had no authority to exclude householders from the [fol. 30] requirements of making the oath in order to qualify for a tax exemption nor to limit that section to claims for exemption from property taxes only.

It was held in *The First Unitarian Church* case that section 32 of the Revenue and Taxation Code is a reasonable regulation provided by the Legislature in administering the tax exemption laws of the state and that case is controlling here. The conclusion of law in the present case to the effect that section 19 of article XX is valid was not carried into the judgment. The conclusion of law that section 32 is invalid formed the sole basis for the judgment ordering the refund.

The judgment ordering the refund is reversed.

Shenk, J.

We Concur:

Schauer, J.

Spence, J.

McComb, J.

[fol. 31]

#### DISSENTING OPINION

For the reasons stated in my dissenting opinion in *First Unitarian Church v. County of Los Angeles*, ante p. . I would affirm the judgment.

Traynor, J.

I Concur:

Gibson, C.J.

[fol. 32]

## DISSENTING OPINION

For the reasons stated in my dissenting opinion in First Unitarian Church of Los Angeles v. County of Los Angeles, *ante p.*, I would affirm the judgment.

Carter, J.

[fol. 33]

[File endorsement omitted]

Order Due  
May 24, 1957

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA  
IN BANK

L. A. No. 23790

[Title omitted]

ORDER DENYING REHEARING—Filed May 22, 1957

Respondent's petition for rehearing Denied.

Gibson C.J, Carter J, & Traynor J are of the opinion  
that the petition should be granted.

Gibson, Chief Justice.

(Petition for rehearing filed May 8, 1957.)

[fol. 34] Clerk's Certificate to foregoing transcript  
omitted in printing.

[fol. 35]

SUPREME COURT OF THE UNITED STATES

No. 385, October Term, 1957

[Title omitted]

ORDER ALLOWING CERTIORARI—October 21, 1957

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted. The case is consolidated with No. 382 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

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[fol. 36] SUPREME COURT OF THE UNITED STATES

No. 385, October Term, 1957

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PEOPLE'S CHURCH OF SAN FERNANDO VALLEY, INC.,  
Petitioner,

v.

COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF LOS ANGELES,  
CALIFORNIA; H. L. BYRAM, COUNTY TAX COLLECTOR.

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ORDER OF SUBSTITUTION OF PARTY PETITIONER—  
December 9, 1957

On Consideration of the motion to substitute Valley Unitarian-Universalist Church, Inc. as the party petitioner in the place and stead of People's Church of San Fernando Valley, Inc. in this case,

It Is Ordered by this Court that the said motion be, and it is hereby, granted.

The Chief Justice took no part in the consideration or decision of this motion.

FILED

AUG 19 1957

JOHN T. FEY, Clerk

IN THE

# Supreme Court of the United States

October Term, 1957

No. **382**

THE FIRST UNITARIAN CHURCH OF LOS ANGELES, a corporation,

*Petitioner,*

*vs.*

COUNTY OF LOS ANGELES, CITY OF LOS ANGELES, H. L. BYRAM, County of Los Angeles Tax Collector, and JOHN R. QUINN, County of Los Angeles Assessor.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

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IN THE  
**Supreme Court of the United States**

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October Term, 1957

No. ....

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THE FIRST UNITARIAN CHURCH OF LOS ANGELES, a corporation,

*Petitioner,*

*vs.*

COUNTY OF LOS ANGELES, CITY OF LOS ANGELES, H. L. BYRAM, County of Los Angeles Tax Collector, and JOHN R. QUINN, County of Los Angeles Assessor.

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**Petition for Writ of Certiorari to the Supreme Court  
of the State of California.**

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Petitioner, The First Unitarian Church of Los Angeles, respectfully prays for a Writ of Certiorari to the Supreme Court of the State of California in order to review its judgment affirming a judgment of the Superior Court of the State of California in and for the County of Los Angeles to the effect that petitioner, in order to receive its traditional church tax exemption, must sign an oath as to what it does not advocate.



### Opinions Below.

The trial court rendered no written opinion.

The opinion of the four majority justices of the court below [R. 43] is reported at 48 Advance California Reports (A. C.) 417, 311 P. 2d 508. The opinions of the three dissenting justices [R. 78 and 92] are reported at 48 A. C. 440 and 447, 311 P. 2d 522 and 527. These opinions are set out hereinafter as Appendix "A."

The judgment of the court below, in conformance with that court's practice, is the final paragraph of the majority opinion [R. 77; Appx. A, p. 522]<sup>1</sup> which reads, "The judgment is affirmed."

### Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed and the time of its entry is April 24, 1957 [R. 43].

2. Timely filed [R. 130] petition for rehearing was denied May 22, 1957 (*ibid*), Chief Justice Gibson and Justices Carter and Traynor being of the opinion that the petition should be granted (*ibid*). No extension of time was requested within which to petition for certiorari.

3. The statutory provisions believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari are 28 U. S. C. 1257(3) and 2101(c).

### Questions Presented for Review.

1. Does Section 32 of California Revenue and Taxation Code (Calif. Stats. 1953, c. 1503, p. 3114, §1)

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<sup>1</sup>The opinions below set out in Appendix "A" are from the advance sheets of 311 P. 2d. Reference to those opinions in the attached Appendix are to the pages as they appear in Pacific 2d.

which takes away the traditional tax exemption from a church that does not sign an oath which reads that it

“does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign Government against the United States in event of hostilities,”

on its face, and as construed and applied to petitioning church, violate:

(a) the freedom of religion, speech or assembly guarantees of the 1st and 14th amendments to the Constitution, or

(b) the due process clause of the 14th Amendment, or

(c) the equal protection clause of the 14th Amendment?

2. Does Article XX, Section 19(b) of the California Constitution which takes away the traditional tax exemption from a church which advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means or which advocates the support of a foreign government against the United States in the event of hostilities, on its face, and as construed and applied to the petitioning church violate federal constitutional rights as set forth above as to Section 32?

3. Does said Section 32 of the California Revenue and Taxation Code and/or Article XX, Section 19(b) of the California Constitution on their face and as construed and applied to the petitioning church violate the supremacy clause, Article VI, Clause 2, of the Constitution?



-4-

## Statement of the Case.

### Facts.

The facts are not in dispute, the allegations in the complaint [R. 1-26] being admitted by the general demurrer [R. 28].

Petitioner is a non-profit religious corporation [R. 1]. Respondents are the taxing bodies, tax collector and tax assessor [R. 2] of the area in which is located real property and buildings owned by petitioner [R. 2, 8]. Said buildings are used solely for religious worship [R. 2, 8]. By reason of Article XIII, Section 1½ of the California Constitution, said property is entitled to the church tax exemption [R. 3, 9]. On the form provided by the assessor for claiming the church tax exemption, petitioner complied with all the requirements save it struck from the form [R. 4, 9] the oath as to non-advocacy prescribed by Section 32 of the California Revenue and Taxation Code. Respondents refused to allow petitioner the church tax exemption [R. 4, 10] and demanded payment of the taxes [R. 4, 10]. Save for petitioner's refusal to execute the said oath, no fact, circumstance or ground existed warranting denial to petitioner of the church tax exemption [R. 4, 10].

Pursuant to the provisions of California law (Rev. & Tax. Code, Secs. 5136-5137) for testing the validity of taxes assessed, petitioner paid the taxes under protest [R. 5, 11], setting forth in its "Protests of Tax Payment" [R. 15-26] its constitutional grounds for claiming the oath and California Constitution, Article XX, Section

19, were invalid [R. 17-20, 23-26] and setting forth [R. 15, 21] as a principle of the church that:

"The principles, moral and religious, of the First Unitarian Church of Los Angeles compel it, its members, officers and minister, as a matter of deepest conscience, belief and conviction, to deny power in the state to compel acceptance by it or any other church of this or any other oath of coerced affirmation as to church doctrine, advocacy or beliefs."

Thereafter, as provided by California law (Rev. & Tax. Code, Secs. 5138-5139), suit was filed to recover the taxes thus paid under protest and for declaratory judgment to the effect that the denial of the church exemption to petitioner was illegal and void [R. 14].

The trial court sustained respondents' demurrer without leave to amend [R. 29] and entered judgment dismissing the action and awarding costs to respondents [R. 30].

On appeal, the court below, 4-3, affirmed [R. 77]. Chief Justice Gibson and Justice Traynor, dissenting, disagreed, stating [R. 78; Appx. A, 522]: "Section 19 of article XX of the California Constitution and section 32 of the Revenue and Taxation Code unjustifiably restrict free speech." Justice Carter, in a separate dissenting opinion [R. 92; Appx. A, 527] held that the oath violated the equal protection clause of the 14th Amendment as well as the guarantee of freedom of speech and, by his reliance upon Jefferson's statement that "rebellion to Tyrants is Obedience to God," the guarantee of freedom of religion as well.

## **How the Federal Questions Were Raised and the Rulings Thereon.**

The Federal questions as to freedom of religion, speech and assembly, due process and equal protection were raised at the outset in the Protests of Tax Payment filed by petitioner when it paid its taxes under protest pursuant to California law [R. 18-20; 24-26] and in the complaint filed in the trial court [R. 6-7, 11-13]. These questions were disposed of adversely to petitioner by that Court when it sustained respondents' demurrer without leave to amend [R. 29] and entered judgment dismissing the action [R. 30].

The court below likewise ruled adversely to petitioner on these questions in the majority opinion [R. 63, 66, 72, 73; Appx. A, 518, 519, 521].

As noted, the dissenting justices below felt otherwise and stated that the provisions in question violated the Federal Constitution [R. 78, 84, 91, 113, 119, 126; Appx. A, 522, 525, 527, 537, 539].

The question of Federal Pre-emption was raised in the briefs on appeal and at the oral argument. This question was considered by the court below and decided adversely to petitioner [R. 75; Appx. A, 522].

## REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

### Preliminary Statement.

There have been set out in the Petition for Writ of Certiorari in *People's Church of San Fernando Valley v. County of Los Angeles*, filed concurrently herewith, involving the same questions as in the instant case, comprehensive reasons for granting the petition. Petitioner here adopts the reasons and arguments there advanced, but seeks in this petition to develop more fully the Separation of Church and State point.

#### I.

**The Oath Here Involved Violates the Freedom of Religion Guarantee of the First and Fourteenth Amendments; It Seriously Breaches the Wall of Separation Between Church and State.**

Petitioner recognizes, of course, that merely stating the proposition that this case involves the problem of the separation of Church and State does not furnish the solution. "This is so because the meaning of a spacious conception like that of the separation of Church from State is unfolded as appeal is made to the principle from case to case." (*McCullum v. Board of Education*, 333 U. S. 203, 212, concurring opinion; cf. *Everson v. Board of Education*, 330 U. S. 1; *Zorach v. Clauson*, 343 U. S. 306.) The appeal to the principle here, however, does call for the application of the watch-word, ceaseless vigilance, "to prevent (its) erosion by . . . the State." (*Roth v. United States*, 354 U. S. ....) We think this is a



clear case where the wall has been breached. It is a case where religion has not been preserved from censorship and coercion; the coercion by the state has not even been subtly exercised (*McCollum v. Board of Education*, *supra*, at 217). It is a case involving matters of the spirit, in which "inroads on legitimacy must be resisted at their incipency" because "this kind of evil grows by what it is allowed to feed on."<sup>2</sup> (Cf. *Sweezy v. New Hampshire*, 354 U. S. ...., concurring opinion.) At the least, the question is of such moment as to deserve review by this Court.

The Court below sustained the validity of the oath against the freedom of religion attack on the ground that [R. 65; Appx. A, 518] "this oath is 'obviously not a test of religious opinion.'" This the court gathered because [R. 65; Appx. A, 518] "the advocacy of the conduct prohibited has been made criminal by Congress."<sup>3</sup> In so doing the majority below has failed to grasp the true meaning of the freedom of religion guarantee<sup>4</sup> and has failed to note that one of the very reasons for the insertion of the clause in the Constitution was because the Founding Fathers were familiar with the coercion which had been theretofore practiced by the State in re-

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<sup>2</sup>Cf. the attempts made in the 1955 and 1957 California Legislature (e. g. S. B. 2003, Calif. Leg. 1955) to empower the State Attorney General to investigate church corporations and to remove any officer, trustee or director found by him to be affiliated, a sponsor of, officer, or member of, any organization found by the Attorney General of the United States to be communist or subversive.

<sup>3</sup>In the Petition for Writ of Certiorari in the *People's Church* case the error of the majority's ruling in this regard by reason of the misreading by it of this Court's decision in *Dennis v. United States*, 341 U. S. 47, is pointed out.

<sup>4</sup>It also failed to take cognizance of the second phrase of the oath regarding advocacy of support, etc.

quiring acquiescence and the bended knee from the Church.<sup>5</sup>

Mr. Justice Carter's dissent below [R. 104-110; Appx. A, 531-534] answers, we submit, the majority's argument.

The theory of the majority below seems to be that the provisions here involved cannot impinge on the freedom of religion guarantee because [R. 63; Appx. A, 518] "The plaintiff is affected not because it is a religious organization but because it is a taxpayer favored in the law by an exemption for which it has refused to qualify. The plaintiff has failed to point out what tenet or doctrine of its faith is infringed upon by compelling it to qualify for the exemption." In its insistence on a "tenet or doctrine or faith," the majority below overlooked the fact (and the demurrer admits same as being the fact) that petitioner's "principles, moral and religious" "as a matter of deepest conscience, belief and conviction" deny "power in the state to compel acceptance by it or any other church of this or any other oath of coerced affirmation as to church doctrine, advocacy or beliefs" [R. 15, 21]. That this is religious faith of the very kind which led to the separation of church and state is, we should think, unquestioned. That the majority below did not

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<sup>5</sup>"It (the Flag salute) requires the individual to communicate by word and sign his acceptance of the political ideas it (the Flag) thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights." (*West Va. Bd. of Ed. v. Barnette*, 319 U. S. 624, 633) citing William Tell's sentence because he refused to salute a bailiff's hat (21 Encycl. Britannica, 14th ed., 911, 912) and William Penn's suffering punishment rather than uncover his head in deference to any civil authority (Braithwait, *The Beginnings of Quakerism* (1912) 200, 228, 230, 232, 233, 447, 451; Fox, *Quakers Courageous* (1941) 113).



conceive this as being a religious tenet or doctrine is suprising because if the First Amendment means anything at all, it means that Courts cannot sit in judgment on the verity of religious faith. "The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state." (*United States v. Ballard*, 322 U. S. 78, 87.)

True, the fact petitioner maintains it is a religious tenet that the State cannot require it to affirm as to its non-advocacy, does not dispose of the question (*Reynolds v. United States*, 98 U. S. 145; *Cleveland v. United States*, 392 U. S. 14; *Prince v. Massachusetts*, 321 U. S. 158). But that it is a religious tenet cannot be gainsaid.

We then must turn to the majority's argument [R. 63] that petitioner is affected not because it is a religious organization but because it is a taxpayer. Implicit in the majority's reasoning is the same error into which this Court fell in *Minersville School District v. Gobitis*, 310 U. S. 586 wherein, regardless of religious belief, school children were required to bend to political orthodoxy by saluting the flag, on pain of expulsion from school. Overruling *Gobitis*, this Court said in *West Virginia Board of Education v. Barnette* (319, U. S. 624, 642):

"If there is one fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force

*citizens to confess by word or act their faith therein."*  
(Italics added.)

But it is precisely this which the oath here requires.<sup>6</sup>

Justice Carter in his dissent below [R. 104-113; Appx. A, 531-534] has shown how the use of the *oath ex-officio* though often couched in religious terms was really a political weapon,<sup>7</sup> and how the freedom effected from religious repression contributed to and went hand in hand with the freedom effected from political repression. The oath in question here, designed, in the view of the majority below, [R. 68; Appx. A, 520] to maintain the loyalty of the people, though couched in political terms, is religious in its effect on the church, for it forces the

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<sup>6</sup>We do not dwell on the "depressing" fact "that the oath has always cropped up as a political device when the political order was crumbling. (Justice Carter, dissenting below [R. 97], quoting from Professor Carl Joachim Friedrich's article, "Teacher's Oaths," 172 Harpers 171, Jan. 1936.) Nor are we unmindful that oaths "are the first weapons young oppression learns to handle; weapons the more odious since, though barbed and poisoned, neither strength nor courage is necessary to wield them." (Sen. James A. Bayard of Delaware, in an address to the Senate, January 16, 1864 [34 Cong. Globe, Part 1, 342].)

<sup>7</sup>In his address in the House of Commons on the repeal of the Test and Corporations Acts, Feb. 26, 1828, Mr. Ferguson said: "(The Test Act) was leveled against the Catholics, not as a religious, but a political sect, at the head of which was the Duke of York and even the King himself." (18 Hansard, Parliamentary Debates, 2nd Series (1828) 718.)

— To James I, the Puritan movement represented the hated doctrine of the separation of church and state. "The official view then prevalent [was] that church and state were one society in a twofold aspect and to assail the former inevitably involved the latter. . . ." (Davies, *The Early Stuarts*, in 9 *Oxford History of England* (1937) 66.) "(T)he real difficulties with the Puritans stemmed from the fact that they were . . . ever discontented with the present government and impatient to suffer any superiority, . . ." (Schaar, *Loyalty in America*, Univ. of Calif. Press, 1957, page 65, quoting from Perry, *Puritanism and Democracy*, Vanguard Press, 1944, page 69.)

church to acknowledge that the state has the power to compel the church to confess its advocacy.

As noted, the majority below said [R. 65, 66; Appx. A, 518, 519] that because the advocacy condemned by the oath has been made illegal by the Smith Act, petitioner cannot complain of the contents of the oath since it is "obviously not a test of religious opinion." The fact, aside, that the majority erroneously interpreted the Smith Act,<sup>8</sup> and the additional fact, also aside, that the majority overlooked the second phrase of the oath having to do with support of a foreign government, etc.,<sup>9</sup> the majority's reasoning misses the mark. The oath which the State here seeks to coerce the Church into taking has to do with what the Church advocates, or rather, what the Church does not advocate. While the majority describes [R. 62; Appx. A, 517] this advocacy as action, no matter how named, it is advocacy nevertheless. And that is the pith of the question. If the principle of the wall of separation of Church from State means anything at all, it must mean that the State has no power to coerce the Church into *stating* that which it does *not* advocate, any more than it can compel the Church to *state* that which it *does* advocate. This is the point. (*West Virginia Board of Education v. Barnette*, 319 U. S. 624, 642; *Everson v. Board of Education*, 330 U. S. 1, 15.)

The use of the Oath to compel political conformity and its effect on the Founding Fathers in relation to the adoption of the First Amendment is well known to this Court.<sup>10</sup>

<sup>8</sup>As demonstrated by *Yates v. United States*, 354 U. S. ....

<sup>9</sup>As to which the Smith Act has nothing to do.

<sup>10</sup>Cf. *American Communications Association v. Douds*, 339 U. S. 382, 447 (dissent); *Everson v. Board of Education*, 330 U. S. 1, 9.



Justice Carter, in his dissent below also tells the story [R. 104-111; Appx. A, 531-534]. We mention here a few examples of oaths, some strikingly similar to that here, all of which played their role in what eventually emerged as the principle of the separation of Church and State.

Sir Thomas More refused to take an oath recognizing that Henry VIII's marriage to Catherine had been invalid *ab initio*. For his reluctance he was convicted and executed for treason on the theory that he had thus denied the King's title as supreme head of the Church.<sup>11</sup>

In 1606, during the reign of James I, an act was passed<sup>12</sup> required a long oath avowing, *inter alia*, that James was the lawful king, declaring that the Pope could not depose him or authorize an invasion of his countries or discharge his subjects of the allegiance to him or permit them to bear arms or raise tumults or *commit violence against him*, swearing allegiance to the King, renouncing the proposition that an excommunicated ruler might be deposed or assassinated by his subjects. At first the oath could be administered to those over eighteen who had been indicted or convicted of recusancy, the failure to attend the Church of England,

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<sup>11</sup>Fisher, History of England From the Accession of Henry VII to the Death of Henry VIII (1910), in 5 Political History of England 353. More is said to have written his daughter: "It was a very hard thing to compel me to say either precisely with it against my conscience to the loss of my soul, or precisely against it to the destruction of my body." (Smith, A History of England (1949) 222; Maguire, Attack of the Common Lawyers on the Oath *Ex Officio* as administered in the Ecclesiastical Courts in England, in Essays in History and Political Theory in Honor of C. H. McIlwain (1936), 211.)

<sup>12</sup>3 Jac. I. C. 4.

but by 1610 the oath was required of persons holding a wide variety of government positions.<sup>13</sup>

The Corporation Act of 1661<sup>14</sup> required all those holding or seeking office to declare under oath their belief in the *unlawfulness of taking arms against the king* as well as disclaiming any obligation under the Solemn League and Covenant (the Puritan's declaration against taking the sacrament according to the Anglican Church). In 1662, by the Act of Uniformity<sup>15</sup> each minister was required to take the Corporation Act oaths. In 1665, by the Five Mile Act,<sup>16</sup> each minister so deposed (for refusal to take the oath) was required to state under oath that under any pretense it was unlawful *to take arms against the King* and to pledge that they would not attempt *any alteration in the government of church or state*. Refusal meant inability to come within five miles of a community in which they had previously preached.

The English, of course, were not alone in their call for oaths as a test of loyalty to the State.

"Polycarp of Smyrna was asked only 'to swear by the Good Fortune of Ceasar.' Speratus Donata and the other Scillitan martyrs likewise were asked merely to swear by the genius of their lord, the emperor, and to pray for his safety." (32 Cal. L. Rev. 1, 2, Comment.) When they would not, they were persecuted not because of their religion but because of their lack, so-called, of loyalty.

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<sup>137</sup> Jac. I, c. 6.

<sup>1413</sup> Car. II, stat. 2, c. 1.

<sup>1514</sup> Car. II, c. 4.

<sup>1617</sup> Car. II, c. 2.

Suspected Christians were asked to offer incense to the Gods or the statues of deified emperors, not to compel religious thinking or worship, but "to symbolize the unity and solidarity of an Empire which embraced so many people of different beliefs and different gods; its intention was political, to promote union and loyalty; . . . ." (Bury, *A History of Free Thought*, pp. 43-44.)

Enough has been shown, we think, for the purposes of this petition, to demonstrate that, in the light of history and tradition, the requirement of the oath here does indeed impinge upon freedom of religion and the separation of Church and State. For if the state can exact today, as the price of tax exemption, an oath as to disavowal of advocacy, on the theory that thus is loyalty shown, tomorrow it can redefine the meaning of loyalty and demand that the Church affirm as to its curriculum and the contents of the sermon. If the instant oath be proper and if the State should deem a more detailed and stringent oath necessary, at what point will the Church be able to maintain that the wall of separation has been breached? It is not the content of the oath alone, but the coercion of Church by State, which truly penetrates the Wall and establishes the Church as subject to the will of the State.

Historically, concepts of loyalty shift and change as the forces pulling and tugging within the State lose or gain strength.<sup>17</sup> The oath of loyalty imposed today by a free society might be thought by many to be objectionable. But what of tomorrow and the day after? Can the Church be forced to surrender its moral con-

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<sup>17</sup>Schaar, *Loyalty in America*, Univ. of Calif. Press, 1957, Chaps. 3, 4 and 5.



victions to a State whose principles fluctuate with the social and economic winds? We think not. The State's inroad must, therefore, "be resisted at (its) incipency."

The court below erred further in failing to understand that even the content of the oath shatters the Wall. Especially is this true of the second phrase which calls for *disavowal* of advocacy of support of a foreign government in the event of hostilities. In other words the church must now, on penalty of loss of tax exemption, foreswear its right of moral judgment in the indefinite future regardless of the issues involved.

It would be to disregard a wealth of history to sustain such a proposition. This Court has not done so. The story is dramatically told in the *Schwimmer*, *Macintosh*, *Bland*, *Girouard* and *Cohnstaedt* series of cases.<sup>18</sup>

The *Girouard* case, it will be remembered, overruled *Schwimmer*, *Macintosh* and *Bland* which had required, as the price of naturalization, that an alien foreswear his conscientious scruples concerning war. The *Macintosh* case, perhaps, best illustrates the point because Professor Macintosh did not claim to be a pacifist. In answer to the question on the preliminary naturalization form, "If necessary, are you willing to take up arms in defense of this country?" he answered: "Yes, but I should want to be free to judge of the necessity." (283 U. S. at 617.) By way of written statement Professor Macintosh said (283 U. S. at 618): "I do not undertake to support my country, right or wrong in any dispute which may arise, and I am not willing to promise before hand, and with-

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<sup>18</sup>*United States v. Schwimmer*, 279 U. S. 644; *United States v. Macintosh*, 283 U. S. 605; *United States v. Bland*, 283 U. S. 636; *Girouard v. United States*, 328 U. S. 61; *Cohnstaedt v. United States*, 339 U. S. 901.

out knowing the cause for which my country may go to war, either that I will or that I will not take up arms in defense of this country, however 'necessary' the war may seem to be to the government of the day." By way of oral testimony at the trial as described by the court, he said (283 U. S. at 618, 619): "he would have to believe that the war was morally justified before he would take up arms in it or give it his moral support. He was ready to give the United States all the allegiance he ever had given or ever could give to any country, but he could not put allegiance to the government of any country before allegiance to the will of God. He did not anticipate engaging in any propaganda against the prosecution of a war which the government had already declared and which it considered justified; but he preferred not to make any absolute promise at the time of the hearing, because of his ignorance of all the circumstances which might affect his judgment with reference to such a war. . . . The position thus taken was the only one he could take consistently with his moral principles and with what he understood to be the moral principles of Christianity."

Macintosh was denied citizenship.

Mr. Chief Justice Hughes, in his historic dissent, later accepted by this court in *Girouard*, said (283 U. S. at 633), that while, undoubtedly, the State had the power to enforce obedience to laws regardless of scruples, nevertheless "in the forum of conscience, duty to a moral power higher than the state has always been maintained"; that "the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation"; that there is abundant room for maintaining the supremacy of law as essential to orderly government "without demanding that . . . citizens . . . shall assume

by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power."

In the *Girouard* case, this Court said (328 U. S. at 68):

"... The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. . . ."

These cases involved admission to citizenship, a governmental interest, at least as weighty, we suggest, as the right to demand taxes. These cases involved aliens, a field in which, save for procedural due process, Congress' authority has been thought to be virtually unlimited (*cf.*, *Galvan v. Press*, 347 U. S. 522). Nevertheless this Court held that man's duty to God, his conscience in the making of moral judgments and in not promising beforehand to give up that right, need not knuckle under to the State.

The oath, as interpreted by the Government, in the *Schwimmer* and following cases was interpreted by this Court as a test oath. No less is the oath at bar. And this Court said in *Girouard* (328 U. S. at 69): "The test oath is abhorrent to our tradition." By its insistence on the oath here, the State, through the decision below, has demanded of the Church that which it may not, consistent with our traditions and the First Amendment.

**Conclusion.**

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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**APPENDIX "A."**

**(Opinions of the California Supreme Court as printed  
at 311 P. 2d 508-540.)**



[2,3] It is contended by the defendant that the evidence is insufficient to support the implied finding of the jury that he had a deliberate, preconceived intent to kill his wife. However, apart from the evidence of threats made against the deceased's life, it may reasonably be inferred from the circumstances surrounding the killing that the defendant was carrying out a preconceived plan to kill his wife. He deliberately broke into her home, sought her out, fired five shots into her body, and gave as his reason that "he couldn't take it any more." It was stated in *People v. Eggers*, 30 Cal.2d 676, at page 686, 185 P.2d 1, at page 6: "No rule can be laid down as to the character or amount of proof necessary to show deliberation and premeditation; each case depends upon its own facts. These elements of murder in the first degree may not be inferred from the killing alone, but are matters of fact, which cannot be implied as matters of law. However, the nature of the weapon used, or acts of malice which, in the usual course of things, would cause death, or great bodily harm, tend to provide a reasonable basis for a conviction of murder in the first degree. In arriving at the intention of the defendant, regard should be given to what occurred at the time of the killing, if indicated by the evidence, as well as to what was done before and after that time." There is substantial evidence in the present case to support the determination by the jury that the killing was one which was "wilful, deliberate, and premeditated" (Pen.Code, § 189). The defendant's claim of voluntary intoxication is not an excuse for the offense. *People v. Burkhardt*, 211 Cal. 726, 730, 297 P. 11; Pen. Code, § 22. "The weight to be accorded to evidence of intoxication and whether such intoxication precluded the accused from forming a specific intention to kill and murder, \* \* \* are matters essentially for the determination of the trier of the facts." *People v. De Moss*, 4 Cal.2d 469, 474, 50 P.2d 1031, 1033. In this case the evidence of the defendant's state of intoxication is insufficient to require a determination as a matter of law that he was incapable of forming the necessary intent.

[4] It is next contended by the defendant that the testimony of the police officer who listened to the telephone conversation between the defendant and Mrs. Dement was inadmissible hearsay; that there was not sufficient identification of the defendant as the speaker, and that the threats made therein were too remote in time to be admissible.

[5] It appears from the record that none of the foregoing objections to the admission of the evidence was made during the trial. In the absence of a seasonable objection in the trial court the defendant should not now be permitted to assign as error the admission of this testimony. *People v. Ferlin*, 203 Cal. 587, 600, 265 P. 230. Particularly in the case of hearsay evidence objections unless made are waived and cannot be urged for the first time on appeal. *People v. Cole*, 141 Cal. 88, 91, 74 P. 547; *People v. Bennett*, 119 Cal.App.2d 224, 226, 259 P.2d 476; *People v. Brown*, 145 Cal.App. 2d —, 303 P.2d 68. As to the remoteness of the threats, this court stated in the early case of *People v. Cronin*, 34 Cal. 191, at pages 205-206: "The testimony as to the threats made by the defendant was competent, notwithstanding they were made a long time prior to the commission of the homicide. Testimony of that character was admissible for the purpose of showing malice, and its competency is unaffected by the lapse of time, though its weight may be impaired. As was said in the case of *State v. Ford*, 3 Strobb., S.C., 517, note, 'remoteness of time where the party has made declarations pointing to a guilty intention, cannot render the evidence incompetent. For [sic] years may roll over a felon's head while he is arranging his schemes or while the guilty thought conceived in his mind is ripening into the deliberate purpose with which crime is committed. In that case there had been a lapse of two and four years.' See, also, *People v. De Moss*, supra, 4 Cal.2d 469, 474, 50 P.2d 1031.

[6] It is further contended in connection with the admission of the evidence of the telephone conversation that in listening to the conversation the police officer per-

formed an illegal act, and that the evidence concerning the message should have been excluded under the rule of *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905. The officer's conduct is claimed to have been improper under section 640 of the Penal Code, as well as section 605 of the Federal Communications Act, 47 U.S.C.A. § 605. When the testimony of the telephone conversation was offered in evidence the only objection interposed by the defendant was on the ground that under section 640 of the Penal Code the witness would be guilty of a felony if he disclosed the content of a telephonic communication clandestinely overheard. The objection was overruled.

Section 640 of the Penal Code makes it a criminal act to tap or to make "any unauthorized connection with any telegraph or telephone wire" when done by "means of any machine, instrument or contrivance, or in any other manner \* \* \*." Section 640 and the sections immediately preceding and following it are prohibitions against what is commonly known as "wire tapping" and the disclosure of information wrongfully obtained thereby. *People v. Trieber*, 28 Cal.2d 657, 662, 171 P.2d 1. The section has no application to the circumstances of the present case. See *People v. Malotte*, 46 Cal.2d 59, 64, 292 P.2d 517; *People v. Channell*, 107 Cal.App.2d 192, 200, 236 P.2d 654.

[7] Section 605 of the Federal Communications Act provides: "\* \* \* no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person \* \* \*." The federal courts have generally held that there is no interception within the meaning of section 605 when the intended receiver consents to or directs the overhearing of the communication at the moment it reaches him. *Goldman v. United States*, 316 U.S. 129, 134, 62 S.Ct. 993, 86 L.Ed. 1322; *United States v. Yee Ping Jong*, D.C., 26 F.Supp. 69, 70; *United States v. Sullivan*, D.C., 116 F.Supp. 480, 482; *United*

*States v. Pierce*, D.C., 124 F.Supp. 264, 267; cf. *United States v. Polakoff*, 2 Cir., 112 F.2d 888, 889, 134 A.L.R. 607. Accordingly there was no violation of either the federal or state statutory provision. See *People v. Malotte*, supra, 46 Cal.2d 59, 63-64, 292 P.2d 517; *People v. Cahan*, 141 Cal.App.2d 891, 901-902, 297 P.2d 715.

Finally, the defendant contends that he is entitled to a reversal or to a reduced sentence because of his claims of error and because the testimony relating to the telephone conversation was inherently improbable. But inherent improbability is not shown by any test suggested by the defendant or otherwise appearing. See *People v. Simpson*, 43 Cal.2d 553, 562-563, 275 P.2d 31; *People v. Johnston*, 73 Cal.App.2d 488, 493, 166 P.2d 633.

No errors have been shown and an examination of the record discloses nothing which would justify a reversal.

The judgment is affirmed.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.



**FIRST UNITARIAN CHURCH OF LOS ANGELES**, a corporation, Plaintiff and Appellant,

v.

**COUNTY OF LOS ANGELES**, City of Los Angeles, H. L. Byram, County of Los Angeles Tax Collector, and John R. Quinn, County of Los Angeles Assessor, Defendants and Respondents.

L. A. 23847.

Supreme Court of California.

April 24, 1957.

Rehearing Denied May 22, 1957.

Action brought to recover taxes paid under protest and for declaratory relief. The Superior Court, Los Angeles County, Bay-

ard Rhone, J., entered judgment for defendants, following sustention of general demurrer to complaint without leave to amend, and plaintiff appealed. The Supreme Court, Shenk, J., held that the state Constitution section, making nonadvocacy of overthrow of government by unlawful means a condition to tax exemption, and statute implementing it, were not repugnant to federal Constitution.

Affirmed.

Traynor and Carter, JJ., and Gibson, C. J., dissented.

#### 1. Taxation ⇨517

Owner of property must pay tax legally assessed.

#### 2. Taxation ⇨191

To provide for exemption from taxation under laws of California requires constitutional, or constitutionally-authorized statutory, authority.

#### 3. Taxation ⇨210

Exemption from taxation is bounty or gratuity on part of sovereign, and even when once granted may be withdrawn.

#### 4. Taxation ⇨204(4)

Exemption from taxation may be granted with or without conditions, but where reasonable conditions are imposed they must be complied with.

#### 5. Taxation ⇨244

Provisions of Constitution subsection, proscribing tax exemption for any person or organization advocating overthrow of government by unlawful means, are mandatory, and applicable to church property exemption provided elsewhere in Constitution; and such subsection was properly incorporated in Constitution as a matter of state policy and is a valid enactment under state law. West's Ann.Const. art. 1, § 22; art. 13, § 1½; art. 20, § 19.

#### 6. Constitutional Law ⇨38

Notwithstanding fact that particular constitutional provision may be self-executing, legislation enacted in aid thereof is not invalid.

#### 7. Taxation ⇨251

Even assuming that statute, requiring property tax exemption claim to contain nonsubversive declarations, were invalid, taxpayer, under general provisions of state law, would not be relieved from its obligation otherwise to disclose facts required by that section. West's Ann.Rev. & Tax. Code, § 32.

#### 8. Taxation ⇨251

Presumption of innocence, available to all in criminal prosecutions, does not relieve or prevent assessor from making investigation enjoined upon him by law to see that exemptions are not improperly allowed; and while his administrative determination is not binding on tax exemption claimant, it is sufficient to authorize assessor to tax property as nonexempt and to place burden on taxpayer to test validity of administrative determination in action at law. West's Ann.Rev. & Tax.Code, §§ 32, 254.

#### 9. Constitutional Law ⇨48

Where any state of facts can reasonably be conceived which would sustain legislative classification, existence of those facts will be presumed. U.S.C.A.Const. Amend. 14.

#### 10. Taxation ⇨194

Statute requiring property tax exemption claim to include nonsubversive declarations, was not rendered invalid, on grounds of unlawful classification and lack of uniformity, because of exception therefrom of householders entitled to exemption under Constitution. West's Ann.Const. art. 13 § 1½; West's Ann.Rev. & Tax.Code, § 32.

#### 11. Taxation ⇨194

Legislature could properly require nonsubversive declarations as condition to property tax exemption while making no such requirements for exemptions from income tax. West's Ann.Rev. & Tax.Code, § 32; West's Ann.Const. art. 20, § 19.

#### 12. Constitutional Law ⇨208(1)

Legislature is at liberty to select one phase of a problem for appropriate action without necessity of including all others



which might be affected in same field of legislation.

### 13. Constitutional Law ⚖84

The First Amendment reflects philosophy that church and state should be kept separate; but of the two concepts embraced therein, only freedom to believe is absolute, and conduct remains subject to regulation for protection of society. U.S.C.A. Const. Amend. 1.

### 14. Taxation ⚖195

"Advocacy" constitutes action and the instigation of action, not mere belief or opinion; and the Constitution inhibition against tax exemption for those advocating overthrow of government by unlawful means imposes only a restriction on action, and not an unconstitutional limitation on belief. U.S.C.A. Const. Amends, 1, 14; West's Ann.Const. art. 20, § 19.

See publication Words and Phrases, for other judicial constructions and definitions of "Advocacy".

### 15. Constitutional Law ⚖84

Advocacy of overthrow of government by unlawful means is against local public policy and has been made criminal by Congress; and even if such advocacy were a part of religious teaching of church, First Amendment would afford no protection therefor. U.S.C.A. Const. Amend. 1.

### 16. Constitutional Law ⚖84

Nonsubversive declarations, required to be included in property tax exemption claim, do not constitute a test of religious opinion, and church claiming exemption is not excused from making them. West's Ann.Rev. & Tax.Code, § 32.

### 17. Constitutional Law ⚖90

Despite the fact that the First Amendment is cast in terms of the absolute, it is not to be applied literally, and there is no absolute right of free speech or unqualified liberty to speak. U.S.C.A. Const. Amend. 1.

### 18. Constitutional Law ⚖90

Courts must declare when individual or group does or does not have a right to

speak freely, after balancing individual's right to speak out against harm or injury society may suffer as result of such speech; and, in each case, court must ask whether gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as is necessary to avoid danger. U.S.C.A. Const. Amend. 1.

### 19. Constitutional Law ⚖283

#### Taxation ⚖193

State Constitution section, making non-advocacy of overthrow of government by unlawful means a condition to tax-exemption, was not repugnant to the "free speech" guarantees of the federal Constitution. West's Ann.Const. art. 20, § 19; U.S.C.A. Const. Amend. 1.

### 20. States ⚖4.13

Federal government's pre-exemption of anti-sedition field, to exclusion of state legislation, is limited to imposition of criminal penalties; and state law requiring non-subversive declarations from tax exemption applicants did not improperly intrude into federal government's domain. West's Ann.Rev. & Tax.Code, § 32.

William B. Murrish, Los Angeles, George T. Altman, Beverly Hills, and Robert L. Brock, Hollywood, for appellant.

Harold W. Kennedy, County Counsel, Gordon Boller, Asst. County Counsel, and Alfred C. DeFlon, Deputy County Counsel, Los Angeles, for respondents.

SHENK, Justice.

This is an appeal from a judgment for the defendants following an order sustaining a general demurrer to the complaint without leave to amend.

The action was brought to recover taxes paid under protest and for declaratory relief. The plaintiff is a duly organized non-profit religious organization with its principal office in the City of Los Angeles. It is the owner of real property devoted exclusively to religious purposes and located within the jurisdiction of, and subject to property taxation by, the County and

City of Los Angeles. It presented to the assessor of Los Angeles County an application for the exemption of its property, particularly described, for the fiscal year 1954-1955. The application was denied by the assessor on the ground that the plaintiff had not qualified for an exemption because it had failed and refused to include in the application for exemption the non-subversive declarations required by section 32 of the Revenue and Taxation Code. The application was otherwise complete. Thereafter the real property of the plaintiff was assessed as property not exempt, and within the time prescribed by law the plaintiff paid the tax under protest and brought this action for the recovery of the sum so paid. The assessor refused to allow the exemption because of the provisions of section 19 of article XX of the Constitution<sup>1</sup> and section 32 of the Revenue and Taxation Code.<sup>2</sup>

Section 19 of article XX was adopted at the general election on November 4, 1952, and was placed as a new section in that article under the heading "Miscellaneous Subjects." The section reads:

"Sec. 19. Notwithstanding any other provision of this Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:

"(a) Hold any office or employment under this State, including but not limited to the University of California, or with any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State; or

"(b) Receive any exemption from any tax imposed by this State or any county, city or county, city, district, political sub-

division, authority, board, bureau, commission or other public agency of this State.

"The Legislature shall enact such laws as may be necessary to enforce the provisions of this section." Stats. 1953.

Following the amendment to the Constitution section 32 was added to the Revenue and Taxation Code in 1953. It is as follows:

"Any statement, return, or other document in which is claimed any exemption, other than the householder's exemption, from any property tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State shall contain a declaration that the person or organization making the statement, return, or other document does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities. If any such statement, return, or other document does not contain such declaration, the person or organization making such statement, return, or other document shall not receive any exemption from the tax to which the statement, return, or other document pertains. Any person or organization who makes such declaration knowing it to be false is guilty of a felony. This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution." Stats. 1953, p. 3114.

The plaintiff contends that both the constitutional provision and the code section are invalid. It is argued that the imposition and collection of taxes sought to be recovered and the denial of the church property tax exemption provided for in section 11½ of article XIII of the Constitution, as applied to the plaintiff church and all

1. Hereinafter referred to as section 19 of article XX.

2. This and all other code sections hereina-

after referred to will be to sections of the Revenue and Taxation Code unless otherwise indicated.



other churches similarly situated; was and is in violation of the provisions of the state and federal constitutions which require reasonable and proper classifications for purposes of taxation and provide for freedom of religion, freedom of speech and the protection of other rights specified in the protest a copy of which is attached to and made a part of the complaint. The provisions of the protest will be referred to later on in this opinion.

It is noted that section 19 of article XX does not specifically mention churches or any other organizations or individuals which are subject to its provisions. Its terms are general and apply to all owners of property as to which exemption from taxation might be claimed.

[1-4] It is fundamental that the payment of taxes has been and is a uniform if not a universal demand of government, and that there is an obligation on the part of the owner of property to pay a tax legally assessed. An exemption from taxation is the exception and the unusual. To provide for it under the laws of this state requires constitutional or constitutionally authorized statutory authority. It is a bounty or gratuity on the part of the sovereign and when once granted may be withdrawn. It may be granted with or without conditions but where reasonable conditions are imposed they must be complied with.

A church organization is in no different position initially than any other owner of property with reference to its obligations to assist in the support of government by the payment of taxes. Church organizations, however, throughout the history of the state, have been made special beneficiaries by way of exemptions. A brief reference to the constitutional and statutory background relating to this and other exemptions in this state will be made.

We find in the Constitution of 1849 the following provisions: "Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed proportion to its value, to be ascertained as

directed by law \* \* \*." Art. XI, § 13, Laws of California, 1850-53, p. 57. No provision for exemption from taxation is found in that Constitution. In 1853 the Legislature passed an act entitled "An Act to provide Revenue for the Support of the Government of this State." Laws of California, 1850-53, p. 669. In section 1 of article I it was provided that all land in the state owned or claimed by any person or corporation shall be listed for taxation. In section 2 of the same article it was provided that "The following property shall not be listed for taxation." Then followed several paragraphs where numerous classifications of property are named, such as publicly owned property, town halls, public squares, colleges, schoolhouses, public hospitals, asylums, poor houses, cemeteries and graveyards. In paragraph 5 it was provided that the following also shall not be listed for taxation: "Churches, chapels, and other buildings for religious worship, with their furniture and equipments, and the lots of ground appurtenant thereto and used therewith, so long as the same shall be used for that purpose only." Laws of California, 1850-1853, p. 671.

This statutory method of providing for exemptions continued until the adoption of the Constitution of 1879. Section 1 of article XIII of the new Constitution required constitutional authority for exemptions. It was there provided that "All property in the State except as otherwise in this Constitution provided, \* \* \* shall be taxed in proportion to its value, to be ascertained as provided by law \* \* \*." In subsequent sections of the same article the exemption of numerous classes of particularly described property is provided for. Section 1½ of article XIII provides for the church exemption as follows: "All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship \* \* \* shall be free from taxation \* \* \*."

In 1944 section 1c was added to article XIII which provides that "In addition to such exemptions as are now provided in this Constitution, the Legislature may exempt from taxation all or any portion of property used exclusively for religious, hospital or charitable purposes \* \* \*." This provision did not have the effect of changing existing laws with reference to the exemption of church property except to authorize the Legislature to extend the exemption of that property as provided for in section 1½ of article XIII to its personal property. Whether that section is self-executing is of no concern for in 1903 the Legislature added section 3611 to the Political Code, repeating the constitutional language which exempted church real property and providing among other things that "any person claiming property to be exempt from taxation under this section shall make a return thereof to the assessor annually, the same as property is listed for taxation, and shall accompany the same by an affidavit showing that the building is used solely and exclusively for religious worship, and that the described portion of the real property claimed as exempt is required for the convenient use and occupation of such building \* \* \*." Stats.1903, p. 21. The reference in that section to property which "is listed for taxation" was in contemplation of section 8, article XIII of the Constitution, which has provided since 1879 that "The Legislature shall by law require each taxpayer in this State to make and deliver to the county assessor, annually, a statement, under oath, setting forth specifically all the real and personal property owned by such taxpayer, or in his possession, or under his control, at 12 o'clock meridian, on the first Monday of March."

Section 3611 of the Political Code was carried into the Revenue and Taxation Code in 1939 as section 254, which provides that any "person claiming the church \* \* \* exemption shall make a return of the property to the assessor an-

nually, the same as property is listed for taxation, and shall accompany it by an affidavit, giving any information required by the" State Board of Equalization. The form prescribed by the State Board of Equalization includes the non-subversive portion of the affidavit, which the plaintiff has refused to include in its return.

[5] No meritorious argument has been or can be advanced to the effect that section 19 of article XX is not a valid enactment under state law or that it is inapplicable to the church property exemption provided for in section 1½ of article XIII. Section 19 of article XX was adopted in accordance with the procedures required by the Constitution for an amendment to that document by vote of the electors of this state. Its provisions are plain and unambiguous and require no interpretation in the matter of their prohibitions. In direct terms it provides that no person or organization included in the proscribed class shall receive an exemption from any tax imposed by the state or any taxing agency of the state. It applies to all tax exemption claimants. Its prohibitions are declared by its own terms and are mandatory and prohibitory. Const. § 22, art. I. By its enactment the people of the state declared the public policy of withholding from the owners of property in this state who engage in the prohibited activities the benefits of tax exemption. The denounced activities are criminal offenses under state law (Stats.1919, p. 281)\* and the act of Congress known as the Smith Act (54 Stat. 670) † makes it unlawful to advocate the overthrow of the government by force and violence.

It may properly be said that the primary purpose of the people of the state in the enactment of section 19 of article XX was to provide for the protection of the revenues of the state from impairment by those who would seek to destroy it by unlawful means. It contains no exceptions. It applies to churches when it provides that "Notwithstanding any other provision of this Con-

\* Pen.Code, § 11490 et seq.

† 18 U.S.C.A. § 2385.

stitution" its prohibitions shall apply to all tax exemption claimants, and declares in effect that the tax revenues of the state shall not be depleted by those who would seek to destroy it in violation of the criminal laws of the state and the nation. It is clear that section 19 of article XX is a valid enactment under the Constitution of the state. That it was properly incorporated in the Constitution as a matter of state policy may not be questioned.

[6] It is then to consider whether section 32 is a valid implementation of section 19 of article XX. Section 32 declares that "This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution." Notwithstanding the fact that a particular provision may be self-executing, legislation enacted in aid thereof is not invalid. *Chesney v. Byram*, 15 Cal.2d 460, 463, 101 P.2d 1106. The code section declares within itself its purpose but that purpose is obvious without the declaration.

[7-10] The plaintiff contends that section 32 is void for several reasons. First, because of the exception from its requirements of householders who are entitled to an exemption of \$100 of assessed value of their personal property as provided for in section 10½ of article XIII of the Constitution. It is contended that this exception renders the section lacking in uniformity and thus provides for an unlawful classification of taxable property under the law. Secondly, that it violates the federal constitutional guarantees of separation of church and state and freedom of speech, Amend. 1. The first contention will be considered in advance of the others for the reason that it involves the application of the Constitution and laws of the state relating to taxation.

If it be assumed for the moment that section 32 is invalid for any of the reasons stated, still the plaintiff, under the general provisions of state law, is not relieved from its obligation otherwise to disclose the facts required by section 32. In this connection the powers and duties of the as-

essor and the obligations of the plaintiff as the owner of real and personal property must be considered in the light of state law. Those powers, duties and obligations are set forth generally in the Revenue and Taxation Code.

It is the duty of the assessor to see that all property within his jurisdiction is legally assessed and that exemptions are not improperly allowed. He is liable on his bond "for all taxes on property which is unassessed through his wilful failure or neglect." § 1361. By section 441 it is provided in accordance with section 8 of article XIII of the Constitution that "Every person shall file a written property statement, under oath, with the assessor between noon on the first Monday in March and 5 p. m. on the last Monday in May, annually, and within such time as the assessor may appoint. At any time, as required by the assessor for assessment purposes, every person shall furnish information or records for examination." For use by the assessor and the property owner the State Board of Equalization is required to prepare the forms of blanks for the property statement. § 452. The assessor may subpoena and examine any person in relation to any statement furnished by him. § 454. Any person who wilfully states to the assessor anything which he knows to be false, in any oral or written statement, even not under oath, but required or authorized to be made and relating to an assessment, is guilty of a misdemeanor. § 461. Section 462 provides that every person is guilty of a misdemeanor who, after proper demand by the assessor, refuses to give the assessor a list of his taxable property or "Refuses to swear to the list." By section 463 it is provided, among other things, that every person shall forfeit \$100 to the people of the state, to be recovered by action brought in their name by the assessor, for each refusal to furnish the property statement or to fail to appear and testify when requested to do so by the assessor.

It thus appears that under the tax laws of the state wholly apart from section 32 it is the duty of the assessor to ascertain the



facts with reference to the taxability or exemption from taxation of property within his jurisdiction. And it is also the duty of the property owner to cooperate with the assessor and assist him in the ascertainment of these facts by declarations under oath.

With particular reference to the many and various tax exemptions, the Revenue and Taxation Code provides for the ascertainment of the facts as a prerequisite to qualification for exemptions. Those facts in many instances must be made known to the assessor by the affidavit of the tax exemption claimant. They include, among others, veterans exemptions, church exemptions, welfare exemptions, college exemptions and orphanage exemptions. In the case of the church exemption the affidavit shall give "any information required" to carry the exemption into effect. § 254. It is significant to note that nowhere in the law of the state is there a requirement for the property owner to make a showing for tax exemptions in the case of householders, cemeteries, game refuges and a few others. It thus appears that the Legislature in addition to the exception of householders from the requirements of section 32 has made no requirement otherwise for any showing on their part of their right to the exemption, either by affidavit or otherwise. If the exclusion of householders from the requirement of section 32 renders that section void as discriminatory or lacking in uniformity it would seem to follow that the entire Revenue and Taxation Code with reference to procedures to qualify for exemptions would be void for the same reason. But obviously no such claim is made.

As stated it is the duty of the assessor to see that exemptions are not allowed contrary to law and this of course includes those which are contrary to the prohibitions provided for in section 19 of article XX. With the aid of section 32 his task is facilitated by the means therein supplied. Without that aid he is nevertheless required to ascertain the facts with reference to tax exemption claimants. Those facts

may be disclosed in several different ways. In the instances in which he is without the assistance or cooperation of the tax exemption claimant and he is relegated to his own devices in discovering the facts he may do so by the examination under oath of the exemption claimant. § 454. If he is satisfied from his investigations that the exemption should not be allowed he may assess the property as not exempt and if contested compel a determination of the facts in a suit to recover the tax paid under protest. In such a case it would be necessary for the claimant to allege and prove facts with reference to the nature, extent and character of the property which would justify the exemption and compliance with all valid regulations in the presentation and prosecution of the claim. In any event it is the duty of the assessor to ascertain the facts from any legal source available. In performing this task he is engaged in the assembly of facts which are to serve as a guide in arriving at his conclusion whether an exemption should or should not be allowed. That conclusion is in no wise a final determination that the claimant belongs to a class proscribed by section 19 of article XX or is guilty of any activity there denounced. The presumption of innocence available to all in criminal prosecutions does not in a case such as this relieve or prevent the assessor from making the investigation enjoined upon him by law to see that exemptions are not improperly allowed. His administrative determination is not binding on the tax exemption claimant but it is sufficient to authorize him to tax the property as nonexempt and to place the burden on the claimant to test the validity of his administrative determination in an action at law. For the obvious purpose, among others, of avoiding litigation, the Legislature, throughout the years has sought to relieve the assessor of the burden, on his own initiative and at the public expense, of ascertaining the facts with reference to tax exemption claimants. In addition to the means heretofore and otherwise provided by law the Legislature, with special

reference to the implementation of section 19 of article XX, has enacted section 32. That section provides a direct, time saving and relatively inexpensive method of ascertaining the facts. The Legislature could take these factors into consideration. It could also take into account the fact that the segment of householders in this state is so overwhelmingly large as compared with others chosen for exemptions that the cost of processing them would justify their separate classification. Where any state of facts can be reasonably conceived which would sustain legislative classification the existence of those facts will be presumed. *Leland v. Lowery*, 26 Cal.2d 224, 232-233, 157 P.2d 639, 175 A.L.R. 1109. Furthermore, aside from the power of the Legislature to classify for the purpose of general legislation, see *Reclamation District v. Riley*, 192 Cal. 147, 156, 218 P. 762; 24 Cal.Jur. 432, there is another and more conclusive reason why it may classify the personal property of householders. Section 14 of article XIII of the Constitution was amended in 1933 to provide that the Legislature "shall have the power to provide for the assessment, levy and collection of taxes upon all forms of tangible personal property \* \* \* may classify any and all kinds of personal property for the purposes of assessment and taxation in a manner and at a rate or rates in proportion to value different from any other property in this State subject to taxation and may exempt entirely from taxation any or all forms, types or classes of personal property." Of this constitutional provision this court said in *Rochm v. County of Orange*, 32 Cal.2d 280, at pages 283-284, 196 P.2d 550, at page 553: "Article XIII of the California Constitution as first adopted provided for a uniform property tax upon real and personal property alike. This requirement of uniform taxation of real and personal property, however, has been abandoned by subsequent amendments. Under these amendments the legislature may classify personal property for purposes of taxation or exempt all personal property or any form, type, or

class thereof", and 32 Cal.2d on page 285, 196 P.2d at page 553 the court declared that this authorization to the Legislature to classify tangible personal property is "all inclusive" and covers "all forms" of tangible personal property. The personal property of the householders falls within the kind of personal property which the Legislature was constitutionally authorized to classify for purposes of taxation.

[11, 12] There is therefore no merit in the plaintiff's contention that the exception of householders from the requirements of section 32 renders that section invalid. There is likewise no merit in the contention that the section is invalid because of the failure of the Legislature to include within its requirements those who are entitled to exemptions under income tax laws and numerous other tax laws wherein certain exemptions are taken into consideration in arriving at the amount of the tax to be paid. Those taxes are in categories which are subject to different treatment by separate classification. The Legislature is at liberty to select one phase of a problem for appropriate action without the necessity of including all others which might be affected in the same field of legislation. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563, and cases there cited. Section 32 applies to all exemption claimants to which it relates and supplies appropriate means for carrying out the purposes of section 19 of article XX. The foregoing application of tax laws of the state is peculiarly a matter of state concern. *Chandler v. Kelsey*, 205 U.S. 466, 27 S.Ct. 550, 51 L.Ed. 882; *Orr v. Gilman*, 183 U.S. 278, 22 S.Ct. 213, 46 L.Ed. 196; 24 Cal.Jur. 434-435.

[13, 14] We turn now to the question of the validity of the constitutional amendment and implementing legislation under guarantees of the federal Constitution. We approach this phase of the case in the light of the fact that section 19 of article XX prescribes no penal sanctions and in a governmental sense may be deemed merely a declaration of state policy with reference to its own tax structure. However,



the plaintiff has taken the position that this constitutional provision is in reality an unlawful limitation on its constitutional rights which are protected by the federal Constitution. This question is extensively argued on behalf of the plaintiff.

It is claimed that section 19 of article XX imposes an unconstitutional condition on the right to a tax exemption in that it violates the First and Fourteenth Amendments of the federal Constitution which prohibit, among other things, the making of any law "respecting an establishment of religion, or prohibiting the free exercise thereof \* \* \*." See *People of State of Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 210, 68 S.Ct. 461, 92 L.Ed. 649; *Cantwell v. State of Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213.

Without the slightest doubt the First Amendment reflects the philosophy that church and state should be kept separate. *Zorach v. Clauson*, 1952, 343 U.S. 306, 312, 72 S.Ct. 679, 96 L.Ed. 954; *Everson v. Board of Education*, 330 U.S. 1, 59, 67 S.Ct. 504, 91 L.Ed. 711. However, the First Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society \* \* \*." *Cantwell v. State of Connecticut*, supra, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213; see also *United States v. Ballard*, 322 U.S. 78, 86, 64 S.Ct. 882, 88 L.Ed. 1148. In the present case it is apparent that the limitation imposed by section 19 of article XX as a condition of exemption from taxation, is not a limitation on mere belief but is a limitation on action—the advocacy of certain proscribed conduct. What one may merely believe is not prohibited. It is only advocates of the subversive doctrines who are affected. Advocacy constitutes action and the instigation of action, not mere belief or opinion. See *Gitlow v. People of State of New York*, 268 U.S. 652, 45 S.Ct. 623, 69 L.Ed. 1138; *Lombacher v. Commissioner of Internal Revenue*, 2 Cir., 54 F.2d 998, 999.

We are concerned then, not with the freedom to believe but with the limited freedom to act. The exercise of religious activity has long been recognized as subject to some limitation if that exercise is deemed detrimental to society. In *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244, the plaintiff was a church member and a conscientious practitioner of its established doctrine which encouraged polygamy. The Supreme Court in holding that such religious activity was subject to legislative limitations, stated, 98 U.S. at page 167 that to permit exceptions based on religious doctrine "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." See also *Cleveland v. United States*, 329 U.S. 14, 67 S.Ct. 13, 91 L.Ed. 12; *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645. There are decisions wherein statutory provisions having some effect on religious activity have been upheld on the ground that their effect was only incidental. In *Zorach v. Clauson*, 1952, supra, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954, the Supreme Court sustained the New York "released time" statutory provisions whereby public schools were permitted to release children for religious purposes during a part of the normal school day. Contentions were made to the effect that those provisions prohibited the "free exercise" of religion or were "respecting an establishment of religion" within the meaning of the First Amendment. The court concluded, 343 U.S. at pages 312-313, 72 S.Ct. at page 683, that the First Amendment "studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Po-

licemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. \* \* \* We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds."

[15] In the present case there is nothing in the new enactments, either constitutional or statutory, which interferes with the free exercise of religion. The plaintiff is affected not because it is a religious organization but because it is a taxpayer favored in the law by an exemption for which it has refused to qualify. The plaintiff has failed to point out what tenet or doctrine of its faith is infringed upon by compelling it to qualify for the exemption. Those tenets and doctrines are set forth in a document attached to the protest of the payment of its taxes and is made a part of the complaint. It announces to the world the plaintiff's high principles and purposes. The prohibited activity cannot, with any reason whatsoever, be consistent with or be tolerated by the religious doctrines there published and subscribed to by the plaintiff. As against a claim that such advocacy might be included within religious teaching the Supreme Court has disposed of the contention. In *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, at page 109, 63 S.Ct. 870, at page 873, 87 L.Ed. 1292, the court stated that "we do not intimate or suggest \* \* \* that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment. *Reynolds v. United States*, 98 U.S. 145, 161, 167, 25 L.Ed. 244, and *Davis v. Beason*, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637, denied any such claim to the practice of polygamy and bigamy. Other claims may well arise

which deserve the same fate." In *Davis v. Beason* [133 U.S. 333, 10 S.Ct. 300], cited in the *Murdock* case, the court said of the advocacy of plural marriages: "To call their advocacy a tenet of religion is to offend the common sense of mankind. \* \* \* The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to His will. \* \* \* It is assumed by counsel of the petitioner that, because no mode of worship can be established or religious tenets enforced in this country, therefore any form of worship may be followed and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practising them. But nothing is further from the truth. \* \* \* [I]t does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion.'" As above noted the advocacy of the conduct prohibited has been made criminal by Congress, Smith Act, 54 Stat., Part I, p. 670 (1940), and through numerous statutory provisions by state legislatures it is well established that such advocacy is against local public policy. See *Levering Act*, Stats. 1951, 3rd Ex.Sess. 1950, ch. 7, p. 15, Government Code, § 3400 et seq. In upholding the validity of the *Levering Act* this court in *Pockman v. Leonard*, 39 Cal.2d 676, 249 P.2d 267, 273, stated that the oath required there and similar in effect to the present one, was "obviously not a test of religious opinion."

[16] It is further claimed by the plaintiff that section 32 imposes unconstitutional limitations upon the exercise of religion. As possibly affecting religion section 32, in addition to the limitations imposed by the Constitution, requires the making of an oath. Since this oath is "obviously not a test of religious opinion" the plaintiff is not excused from making it any more than any other taxpayer. It appears that an oath was subscribed on behalf of the plain-

tiff by one of its officers when it filed its affidavit with the claim for exemption and its complaint in this action was also verified on its behalf. If the making of the oath is objectionable to the plaintiff it must be for reasons relating to the content of the particular oath and not merely because it is an oath. This contention, therefore, may not be sustained.

[17-19] It is also claimed that section 19 of article XX is a restriction on freedom of speech. The phrase "freedom of speech" is helpful in bringing to mind the concept which it means to convey, but as is often the case such a descriptive phrase assumes a literal meaning which causes difficulty and confusion in the development of the law surrounding it. Justice Holmes aptly stated that it "is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." See *Hyde v. United States*, 225 U.S. 347, 390, 32 S.Ct. 793, 811, 56 L.Ed. 1114, 1135; see also Corwin, *Bowing Out "Clear and Present Danger"*, 27 *Notre Dame Lawyer* 325.

Despite the fact that the First Amendment is cast in terms of the absolute it is not to be applied literally. There never has been an absolute right of free speech or an unqualified liberty to speak. "Speech" in the broad sense embodies all means of expression and communication. It is the primary vehicle by which individuals and organizations converse and transmit ideas, information and knowledge, and is deserving of the highest degree of protection and preservation. But there are other important interests of society which, at times, may conflict with the interest of individuals or groups in the exercise of this asserted freedom. In such circumstances the courts must declare when the individual or group does or does not have a right to speak freely, depending on a balance of the individual's right to speak out as against the harm or injury society may suffer as a result of such speech. The courts have been called upon to engage in this weighing process in many instances. Illustrative are

those which protect society from a breach of the peace (*Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031), "loud and raucous" noises caused by sound trucks (*Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 449, 93 L.Ed. 513), interruption of the free flow of commerce (*American Communications Association v. Douds*, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925) and the like.

The standard by which the various interests have been balanced has, until recently, been the so-called "clear and present danger" test. It was heretofore declared that the right to free speech could be infringed upon only in situations where it appeared that the "words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils" sought to be repressed. *Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470. However, in *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 868, 95 L.Ed. 1137, the Supreme Court, reviewing its earlier decisions in this field, reconsidered the test in the light of existing and recognized realities and in conclusion stated: "Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' [*United States v. Dennis*, 2 Cir.,] 183 F.2d [201] at [page] 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words." By that statement of the test the standard by which a weighing of interests is to be made is clearly indicated.

The interest of the state in protecting its revenue raising program from subversive exploitation has already been considered. There are additional interests with which the state is concerned and which it is at-



tempting to promote by granting exemptions from taxation. Included is the interest of the state in maintaining the loyalty of its people and thus safeguarding against its violent overthrow by internal or external forces. This legitimate objective is sought to be accomplished by placing in a favored economic position, and thus to promote their well-being and sphere of influence, those particular persons and groups of individuals who are capable of formulating policies relating to good morals and respect for the law. It has been said that when church properties are exempted from taxation "it must be because, apart from religious considerations, churches are regarded as institutions established to inculcate principles of sound morality, leading citizens to a more ready obedience to the laws." *County of Santa Clara v. Southern Pac. R. Co., C.C.*, 18 F. 385, 400; 24 Cal.Jur. 105. The same may be said of others enjoying tax exemptions, notably veterans (§ 114, article XIII; *Allied Architects Ass'n of Los Angeles v. Payne*, 192 Cal. 431, 221 P. 209, 30 A.L.R. 1029; *Veterans' Welfare Board v. Riley*, 188 Cal. 607, 611, 206 P. 631), colleges (§ 1a, article XIII), and charitable organizations (§ 1c, article XIII) which, together with church groups, occupy positions whereby they may exert a salutary influence on the moral well-being of the community. Encouragement to loyalty to our institutions and an incentive to defend one's country in the event of hostilities are doctrines which the state has plainly promulgated and intends to foster. It is the high purpose residing in its people that the state is attempting to encourage in its endeavor to protect itself against subversive infiltration. The propriety of that objective is recognized by the Supreme Court in the *Dennis* case (*Dennis v. United States*, supra, 341 U.S. 494, at page 569, 71 S.Ct. 857, at page 867), where it said: "Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected."

Obviously a program of tax exemption designed to promote adherence to the principles of our government but constrained to include within its bounty persons or organizations actively advocating subversion and the support of enemies in time of hostilities, would be wholly without reason and result in its own defeat.

The test requires further that consideration be given not only to the "gravity of the evil" sought to be repressed but that the evil be "discounted by its improbability." The *Dennis* case involved the validity of the Smith Act which prohibited and made criminal the advocacy of the activities denounced by the people of this state in its Constitution. In speaking of the imminence of the threat posed by the advocacy of subversive activities, the court, 341 U.S. at page 569, 71 S.Ct. at page 867, stated: "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. \* \* Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent." In that case the court upheld an instruction to the jury that if the defendants actively advocated governmental overthrow by force and violence as speedily as circumstances would permit, then, as a "matter of law \* \* \* there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution." In the present case the constitutional provision is concerned with those who advocate the same prohibited activity. It must be said that such advocacy from whatever source poses a threat to our government and that the gravity of the evil is not to be materially discounted by its improbability within the meaning of the test employed in the *Dennis* case.

Against the fundamental interest sought to be safeguarded by the state it is neces-

sary to consider and balance the interest of those who assert that their right to speak has been unduly limited. From what has heretofore been said it is apparent that the limitation on speech is a conditional one, imposed only if a tax exemption is sought; that the prohibited advocacy is penal in nature, and that not one of the fundamental guarantees but only a privilege or bounty of the state is withheld if the exemption claimant prefers to engage in the prohibited criminal advocacy. It is obvious, therefore, that by no standard can the infringement upon freedom of speech imposed by section 19 of article XX be deemed a substantial one.

Apart from considerations involving the constitutional amendment the additional requirement of an oath imposed by section 32, of and by itself, gives no cause for the plaintiff to complain that it is improperly deprived of constitutional freedoms where compliance with the oath requirements otherwise may properly be imposed. *Chesney v. Byram*, supra, 15 Cal.2d 460, 465-468, 101 P.2d 1106.

Statutory limitations on the free exercise of speech similar in nature to the present limitation have been imposed as valid conditions upon which some privilege, benefit or conditional right has been withheld by a state. For example, as a condition to obtaining or maintaining employment state employees have been required to subscribe to oaths which declare their nonadvocacy of subversive activities (*Pockman v. Leonard*, supra, 39 Cal.2d 676, 249 P.2d 267); as have county employees (*Hirschman v. County of Los Angeles*, 39 Cal.2d 698, 249 P.2d 287, 250 P.2d 145; *Steiner v. Darby*, 88 Cal.App.2d 481, 199 P.2d 429), municipal employees (*Garner v. Board of Public Works of City of Los Angeles*, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317, affirming *Garner v. Board of Public Works*, 98 Cal.App.2d 493, 220 P.2d 958), public school teachers (*Adler v. Board of Education*, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517; *Steinmetz v. California State Board of Education*, 44 Cal.2d 816, 285 P.2d 617; *Board of Education of City of Los*

*Angeles v. Eisenberg*, 129 Cal.App.2d 732, 277 P.2d 943; *Board of Education of City of Los Angeles v. Wilkinson*, 125 Cal.App.2d 100, 270 P.2d 82), and candidates for public offices (*Gerende v. Board of Sup'rs of Elections of Baltimore City*, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745; *Shub v. Simpson*, 196 Md. 177, 76 A.2d 332). The right to a bounty or other benefits from the state has been so conditioned in the case of applicants for state unemployment benefits. *State v. Hamilton*, 92 Ohio App. 285, 110 N.E.2d 37; *Dworken v. Collopy*, Ohio Com. Pl., 91 N.E.2d 564. Even the right to vote (*Opinion of the Justices*, 252 Ala. 351, 40 So.2d 849), and to citizenship (*United States v. Schwimmer*, 279 U.S. 644, 49 S.Ct. 448, 73 L.Ed. 889), has been so conditioned.

The plaintiff contends that the constitutional amendment and implementing legislation are invalid for other reasons based on constitutional guarantees. Such contentions are without merit in view of what has been said in disposing of the basic contentions presented.

[20] Attention has been directed to the recent decision in *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477, 483, 100 L.Ed. 640 (April 2, 1956), wherein the Supreme Court declared invalid a Pennsylvania penal provision (Pa. Penal Code § 207, 18 Purdon's Pa.Stat. Ann. § 4207) which made it a crime to advocate the violent overthrow of the federal or state government. Reasons for the decision in that case were that Congress had occupied the field to the exclusion of "parallel" state legislation; that the dominant interest of the federal government required that such "prosecutions" should be exclusively within the control of the federal government, and that the "Pennsylvania Statute presents a peculiar danger of interference with the federal program." It is clear from the opinion of the court in that case that the exclusion of state sedition legislation was limited to the imposition of criminal penalties. The court directed its attention to "anti-sedition statutes, criminal anarchy laws, criminal syndicalist laws,



etc." No reference is made to the many so-called loyalty oath cases considered by the court in recent years. The court's intention not to change or modify the established law in those cases by what it said in the Nelson case appears from its later opinion in *Slochower v. Board of Higher Education*, 350 U.S. 551, 76 S.Ct. 637, 100 L. Ed. 692, decided on April 9, 1956, one week after the court's decision in the Nelson case. In speaking of balancing the state's interest in the loyalty of certain persons against the interests of those persons in their individual rights, the court referred by way of illustration to its earlier decisions in *Adler v. Board of Education*, supra, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517, and *Garner v. Board of Public Works of City of Los Angeles*, supra, 341 U.S. 716, 720, 71 S.Ct. 909, 95 L.Ed. 1317. In both of those cases, the court upheld the validity of state legislation which required, as a condition to acquiring or maintaining particular privileges or rights by certain persons, that such persons refrain from advocating the violent overthrow of our form of government. If in the present case the constitutional amendment and implementing legislation infringe upon an area occupied exclusively by Congress within the scope of the decision in the Nelson case, certainly the same conclusion would be true of the enactments involved in the *Garner* and *Adler* cases and the court would not have approved those decisions in the *Slochower* case. Furthermore, in any consideration of the possible application of the Nelson case to the case at bar, it would be unreasonable to conclude that the Federal government intends to or has occupied the field of state taxation.

Finally it should be observed that we are here dealing with questions of law and not with any questions of fact with reference to the activities of the plaintiff organization. As hereinbefore noted there is attached to the protest filed with the payment of the tax sought to be recovered a statement of the principles and objectives of the plaintiff in furtherance of its religious activities. Those principles and doctrines reflect the high ideals of morality

and personal conduct which are basic in the foundation of our system of government both state and national. They are noble in purpose and inspiration in tone. It is inconceivable that an organization actuated by the doctrinal pronouncements there declared would knowingly harbor within itself any person or group of persons who would engage in the subversive activities referred to in section 19 of article XX. It is taken for granted that an organization actuated by those high purposes and ideals would be the first to champion the efforts of the state to protect itself against the destruction of those guarantees which are necessary to the existence of the plaintiff and to the preservation of the fundamental rights which it otherwise enjoys. But an assumed fact of the non-existence of subversion in an organization is not enough. The law demands the ascertainment of that fact for purposes of taxation and section 32 requires the cooperation of the plaintiff in establishing it.

No good reason has been advanced why churches as well as all of the many other organizations seeking exemption from taxation should not be required to comply with the law of the state providing for assistance to the county assessors in the discharge of their duties to ascertain the facts which would justify the exemption. By the plaintiff's failure and refusal to allege that it has complied with the law which would enable it to qualify for the exemption the complaint fails to state a cause of action. The demurrer was therefore properly sustained without leave to amend.

The judgment is affirmed.

SCHAUER, SPENCE and McCOMB, JJ., concur.

TRAYNOR, Justice.

I dissent.

Section 19 of article XX of the California Constitution and section 32 of the Revenue and Taxation Code unjustifiably restrict free speech. Section 19 in effect

imposes a penalty in the form of withholding a tax exemption upon any person or organization that chooses to speak in a certain manner, namely, by advocating overthrow of the federal or state governments by force or support of a foreign government against the United States in event of hostilities. Section 32 provides a special method of enforcing these restrictions as to certain tax exemptions. A person claiming one of these exemptions must make a declaration that he does not advocate the conduct specified in section 19. In effect the provisions impose a tax measured by the exemptions allowed to others not only upon those who advocate overthrow of the government by force or support of a foreign government in event of hostilities, but also upon those who do not advocate such conduct but refuse to declare that they do not.

A restraint on free speech is not less a restraint when it is imposed indirectly through withholding a privilege rather than directly through taxation, fine, or imprisonment. This court so held in *Danskin v. San Diego Unified School District*, 28 Cal.2d 536, 547-548, 171 P.2d 885, 892, involving a comparable privilege, the use of school buildings for public meetings. "It is true that the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable. \* \* \* The very purpose of a forum is the interchange of ideas, and that purpose cannot be frustrated by a censorship that would label certain convictions and affiliations suspect, denying the privilege of assembly to those who held them, but granting it to those whose convictions and affiliations happen to be acceptable and in effect amplifying their privilege by making it a special one. In the competitive struggle of ideas for acceptance they would have a great strategic advantage in making themselves known and heard in a forum where the competition had been diminished by censorship,

and their very freedom would intensify the suppression of those condemned to silence. It is not for the state to control the influence of a public forum by censoring the ideas, the proponents, or the audience; if it could, that freedom which is the life of democratic assembly would be stilled. And the dulling effects of censorship on a community are more to be feared than the quickening influence of a live interchange of ideas."

The tax exemptions in question are likewise comparable to the privilege of using the mails at less than cost. In *Hannegan v. Esquire*, 327 U.S. 146, 156, 66 S.Ct. 456, 461, 90 L.Ed. 586, the court declared that, "grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. \* \* \* Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. The provisions of the [statute] would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country." The dissent of Mr. Justice Brandeis in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U.S. 407, 430-431, 41 S.Ct. 352, 361, 65 L.Ed. 704, invoked in the *Esquire* case, reasoned that, "Congress may not through its postal police power put limitations upon the freedom of the press which if directly attempted would be unconstitutional. This court also stated in *Ex parte Jackson* [96 U.S. 727, 24 L.Ed. 877], that—'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' It is argued that although a newspaper is barred from the second-class mail, liberty of circulation is not denied, because the first and third-class mail and also other means of transportation are left open to a publisher. Constitutional rights should not be frittered away by arguments



so technical and unsubstantial. "The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name." *Cummings v. State of Missouri*, 4 Wall. 277, 325, 18 L.Ed. 356. The government might, of course, decline altogether to distribute newspapers; or it might decline to carry any at less than the cost of the service; and it would not thereby abridge the freedom of the press, since to all papers other means of transportation would be left open. But to carry newspapers generally at a sixth of the cost of the service and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression."

Although free speech may not be an absolute right, it must be jealously guarded. As the court stated in *American Communications Ass'n v. Douds*, 339 U.S. 382, 412, 70 S.Ct. 674, 691, 94 L.Ed. 925; the first amendment "requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom." That test is still a valid one. It was not repudiated in *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137. The court was there concerned not to abolish the clear and present danger test but to bend it to the special situation of a critical time and the diabolic strategy of the Communist Party. As before, the key word in its solution was danger: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 341 U.S. at page 510, 71 S.Ct. at page 868. There was evidence that the defendants, members of the Communist Party, advocated overthrow of the government by force and violence. The jury was instructed that it could not find them guilty under the statute unless it found that they had conspired with the intent that their advocacy "be of a rule or principle of action and by language reasonably and ordinarily calculated to incite per-

sons to such action, all with the intent to cause the overthrow or destruction" of the government by force. The jury had also to determine whether the defendants intended to overthrow the government "as speedily as circumstances would permit." Moreover, the court of appeals held that the record supported the conclusion that "the Communist Party is a highly disciplined organization, adept at infiltration into strategic positions, use of aliases, and double-meaning language; that the Party is rigidly controlled; that Communists, unlike other political parties, tolerate no dissension from the policy laid down by the guiding forces, but that the approved program is slavishly followed by the members of the Party \* \* \*". 341 U.S. at pages 498, 511-512, 71 S.Ct. at pages 861, 867, 868.

It is essential in each case to inquire into the character of the speech to be restrained and the surrounding circumstances. The probability that advocacy will break out in action depends on the numbers, methods, and organization of the advocates.

The state provisions in question penalize advocacy in a totally different context from that in the *Dennis* case. The penalty falls indiscriminately on all manner of advocacy, whether it be a call to action or mere theoretical prophecy that leaves the way open for counter-advocacy by others. Moreover, with regard to advocacy of support of a foreign government, the state provisions penalize not only advocacy during actual hostilities but also advocacy during peacetime of action during hostilities that may occur, if at all, in the remote future.

There is no evidence in the present case that plaintiff church or its members advocate the overthrow of the government by force or otherwise. There is no evidence that plaintiff church or any of the organizations seeking tax exemptions are infiltrated by Communists or other disloyal persons, or that they are in any danger of such infiltration. The evidence is all to the contrary. It is baldly assumed that plaintiff church advocates the overthrow of the government by force because it refuses to declare that it does not. It is one thing for a court to

sustain convictions after it has concluded following a full trial that it is dealing with an organization wielding the power of a centrally controlled international Communist movement; it is quite another to deprive a church of a tax exemption on the ground that it will not declare that it does not advocate overthrow of the government.

If it is unconstitutional to restrain plaintiff from advocating overthrow of the government, it is *a fortiori* unconstitutional to require it to prove or declare that it does not advocate overthrow of the government. See *Danskin v. San Diego Unified School District*, 28 Cal.2d 536, 348, 171 P.2d 885. Such a restraint is the more vicious because it penalizes not only those who advocate overthrow of the government but also those who do not but will not declare that they do not. There are some who refuse to make the required declaration, not because they advocate overthrow of the government, but because they conscientiously believe that the state has no right to inquire into matters so intimately touching political belief. Rightly or wrongly they fear that such an inquiry is the first step in censorship of unpopular ideas. Even in the face of a bona fide danger, the state has no power to embark on an unnecessary wholesale suppression of liberty. See *Butler v. State of Michigan*, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412.

The majority opinion, however, invokes the rule that the government may attain a legitimate objective through means reasonably related thereto even though there is an incidental restraint on speech. Thus, in securing qualified and trustworthy employees for government service a loyalty oath may be required, not for the purpose of restraining speech, but as a means of selection. *Adler v. Board of Education*, 342 U.S. 485, 492 et seq., 72 S.Ct. 380, 96 L.Ed. 517; *Garner v. Board of Public Works*, 341 U.S. 716, 720 et seq., 71 S.Ct. 900, 95 L.Ed. 1317; *Gerende v. Board of Sup'rs of Elections of Baltimore City*, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745; *Steinmetz v. California State Bd. of Education*,

44 Cal.2d 816, 285 P.2d 617; *Pockman v. Leonard*, 39 Cal.2d 676, 249 P.2d 267. Similarly, *American Communications Ass'n v. Douds*, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925, held that in seeking to keep interstate commerce free of political strikes, Congress may require labor officials to file non-Communist affidavits as a condition to their unions' invoking the jurisdiction of the National Labor Relations Board.

In such cases it is necessary to determine whether the provisions that incidentally restrain speech are in fact reasonably related to the attainment of the governmental objective. In *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605, certiorari denied, 350 U.S. 882, 76 S.Ct. 135, 100 L.Ed. 778, the Supreme Court of Wisconsin considered a federal statute that provided in effect that no housing unit constructed under the statute could be occupied by a member of an organization designated as subversive by the Attorney General. Pursuant to this statute, the Milwaukee Housing Authority adopted a resolution that required its tenants to execute a certificate of non-membership in the listed organizations. The court held the resolution unconstitutional, and after discussing the *Douds* case stated: "It is beyond our power to comprehend how the evil which might result from leasing units in a federally aided housing project to tenants who are members of organizations designated subversive by the Attorney General is in any way comparable in substantiality to that which would result to the general welfare through communists in control of labor organizations disrupting commerce by calling strikes to carry out Communist Party policy. This court deems the possible harm which might result in suppressing the freedoms of the First amendment outweigh any threatened evil posed by the occupation by members of subversive organizations of units in federally aided housing projects." 270 Wis. at pages 287-288, 70 N.W.2d at page 615. In considering the same problem, the Supreme Court of Illinois pointed out that, "The purpose of the Illinois Housing Authorities Act [S.H. A. ch. 67½, § 1 et seq.] is to eradicate slums



and provide housing for persons of low-income class. [Citation.] It is evident that the exclusion of otherwise qualified persons solely because of membership in organizations designated as subversive by the Attorney General has no tendency whatever to further such purpose." *Chicago Housing Authority v. Blackman*, 4 Ill.2d 319, 122 N.E.2d 522, 526.

In the present case the majority opinion thus states the governmental objective: "Encouragement to loyalty to our institutions and an incentive to defend one's country in the event of hostilities \* \* \* doctrines which the state has plainly promulgated and intends to foster. It is the high purpose residing in its people that the state is attempting to encourage in its endeavor to protect itself against subversive infiltration. \* \* \* Obviously a program of tax exemption designed to promote adherence to the principles of our government but constrained to include within its bounty persons or organizations actively advocating subversion and the support of enemies in time of hostilities, would be wholly without reason and result in its own defeat."

The issue thus narrows to whether a state can properly restrain free speech in the interest of promoting what appears to be eminently right thinking. A state with such power becomes a monitor of thought to determine what is and what is not right thinking. Great as a state's police power is, however, the United States Supreme Court has yet to sanction its breaking into people's minds to make them orderly. In holding that school children may not be compelled to salute the flag as a condition to attending public schools, the Supreme Court through Mr. Justice Jackson stated that, "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harm-

less to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641-642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628.

Advocacy does not occur in an intellectual vacuum. Usually it answers or challenges other advocacy. As Mr. Justice Frankfurter aptly stated in *Dennis v. United States*, 341 U.S. 494, 549-550, 71 S.Ct. 857, 887, 93 L.Ed. 1137: "Of course no government can recognize a 'right' of revolution, or a 'right' to incite revolution if the incitement has no other purpose or effect. But speech is seldom restricted to a single purpose, and its effects may be manifold. A public interest is not wanting in granting freedom to speak their minds even to those who advocate the overthrow of the Government by force. For, as the evidence in this case abundantly illustrates, coupled with such advocacy is criticism of defects in our society. Criticism is the spur to reform; and Burke's admonition that a healthy society must reform in order to conserve has not lost its force. Astute observers have remarked that one of the characteristics of the American Republic is indifference to fundamental criticism. Bryce, *The American Commonwealth*, c. 84. It is a commonplace that there may be a grain of truth in the most uncouth doctrine, however false and repellant the balance may be. Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed. No matter how clear we may be that the de-



defendants now before us are preparing to overthrow our Government at the propitious moment, it is self-delusion to think that we can punish them for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance. It is a sobering fact that in sustaining the convictions before us we can hardly escape restriction on the interchange of ideas."

Section 32 impedes not only advocacy itself but discussion short of advocacy that may be of the utmost value. As Mr. Justice Jackson pointed out in the Dennis case, "Of course, it is not always easy to distinguish teaching or advocacy in the sense of incitement from teaching or advocacy in the sense of exposition or explanation," and Mr. Justice Frankfurter recognized that, "there is no divining rod by which we may locate 'advocacy.' Exposition of ideas readily merges into advocacy." 341 U.S. at pages 545, 572, 71 S.Ct. at pages 885, 898. Yet section 32 compels the cautious to forego discussion for fear they will overstep the line that no divining rod can locate.

Errors in thought or expression are best counteracted by deeper thought and more cogent expression. Only through free discussion can subversive doctrines be understood and effectively combatted. "The interest, which [the First Amendment] guards, and which gives it its importance, presupposes that there are no orthodoxies—religious, political, economic, or scientific—which are immune from debate and dispute. Back of that is the assumption—itself an orthodoxy, and the one permissible exception—that truth will be most likely to emerge, if no limitations are imposed upon utterances that can with any plausibility be regarded as efforts to present grounds for accepting or rejecting propositions whose truth the utterer asserts, or denies."

\* \* \* In the last analysis it is on the validity of this faith that our national security is staked." Mr. Justice Frankfurter concurring in *Dennis v. United States*, 341 U.S. 494, 550, 71 S.Ct. 857, 888.

The majority opinion in the present case goes far beyond any United States Su-

preme Court decision in upholding legislation that restricts the citizen's right to speak freely. Section 19 of article XX, implemented by section 32 of the Revenue and Taxation Code, arbitrarily assumes that those who seek tax exemptions advocate overthrow of the government unless they declare otherwise. The provisions infringe the right to engage in such advocacy without reference to its seriousness, inhibit free discussion short of advocacy, and penalize the belief that the government has no right to require professions of innocence in the absence of proof of guilt. A law with such consequences cannot stand in the face of the constitutional guarantees.

I would reverse the judgment.

GIBSON, C. J., concurs.

CARTER, Justice.

I dissent.

I approach the consideration of this case with a profound consciousness that the problems involved may have a direct impact upon the stability of our state and federal governments. Evidently those who enacted the legislation here involved felt that it was necessary to preserve the status quo of those governments. On the other hand the plaintiff challenges the enactments as an invasion of fundamental constitutional guarantees to it and other religious institutions. We are, therefore, at the outset, faced with the problem as to what sanctions, in the way of pledges of fealty and loyalty, our government may exact from a taxpayer in order to qualify the latter for a tax exemption granted to all in the same class. The solution of this problem depends upon our interpretation and application of the constitutional guarantees relied upon by plaintiff as barriers against such sanctions.

It must be remembered that while our government was "conceived in liberty," it was born in revolution. The Declaration of Independence was the antithesis of a pledge of allegiance or loyalty to the British government of which the then American colonists were a part. This memora-

ble document epitomized the concept of its framers of the objects and purposes of government and the right of the people to change it, by force if necessary. It declared: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and, accordingly, all experience hath shown, that mankind are more disposed to suffer while evils are sufferable; than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object, evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government."

The events which followed the adoption of the Declaration of Independence by the Continental Congress on July 4, 1776, are well known to every student of American history. These events culminated in the Constitutional Convention at Philadelphia during the summer of 1787 where the Constitution of the United States was drafted. Many of the delegates at the Constitutional Convention had been members of the Continental Congress which had adopted the Declaration of Independence. They were revolutionists in the truest and most digni-

fied sense. It should be remembered that the Declaration of Independence and the Constitution of the United States were prepared by a group of men who had endured tyranny under a monarchical form of government for over three generations. They were the leaders in the struggle which overthrew that government and they sought to establish a government of the people, by the people, and for the people, which would derive its just powers from the consent of the governed. They sought to establish justice, ensure domestic tranquility, promote the general welfare, provide for the common defense and secure the blessings of liberty to themselves and their posterity—a government which would govern without tyranny and without oppression and which would guarantee to the governed all of the liberty that a free people in a homogeneous society could enjoy.

The great liberality accorded to the guarantees of freedom of speech and press by those at the head of our government during its formative period is exemplified by the following statement in the First Inaugural Address of President Thomas Jefferson. He there declared: "If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." This same concept was again expressed by Mr. Jefferson in his letter to Benjamin Rush in these words: "I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man." This concept was more recently depicted by Mr. Justice Brandeis in *Whitney v. People of State of California*, 274 U.S. 357, 47 S.Ct. 641, 648, 71 L.Ed. 1095, in words that will forever be a part of our American heritage. "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the process of popular govern-



ment, no danger flowing from speech can be deemed clear—and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

Over a century and a half has elapsed since the above quoted utterances of Thomas Jefferson. Our government has withstood one major revolution and several minor armed rebellions but the fundamental basic concept of civil liberties embraced within the Bill of Rights has remained unimpaired.

It is worthy of note that the framers of the Constitution of the United States saw fit to exact of the person who assumed the office of President a very simple oath which reads as follows: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will, to the best of my Ability, preserve, protect, and defend the Constitution of the United States." U.S. Const. art. II, § 1. This is the only oath mentioned in the Constitution. Notwithstanding the great trust reposed in and power conferred upon the President of the United States by the Constitution and laws enacted by Congress, no other oath or pledge of loyalty may be exacted of him. Nevertheless no President has ever been suspected of disloyalty. It may be said with confidence that history has demonstrated the wisdom of the framers of the Constitution in drafting an oath so simple and yet so effective that it has endured the tests of time and trial. The past at least is secure. But such an oath was not deemed sufficient to insure the loyalty and fealty of the Vice President, members of Congress and other officials of our national government. Although no other official of our government possesses the power or authority of the President, they are required to take an oath much more exacting as it amounts to a pledge of allegiance. This oath is con-

tained in an act of Congress and is as follows: "I \* \* \* do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." 5 U.S.C.A. § 16. I find no fault with this oath and recognize the propriety of exacting such an oath from one who assumes an official position with our government. It will be observed, however, that neither of the above quoted oaths has the slightest resemblance to the test oath here involved. In commenting on such an oath Dr. Carl Joachim Friedrich, Professor of Government, of Harvard University has the following to say: "It is depressing to realize that the oath has always cropped up as a political device when the political order was crumbling. In the period of religious dissensions the oath of allegiance made its appearance in England as an instrument of intolerance and, a little later, of royal oppression. James Stuart, the tiresome pedant on the throne, sought refuge in an oath required of all ministers and the like (most teaching then being religious). At that time the imperial pretensions of the 'reformed' papacy, the right of the Pope claimed by the Jesuits to absolve the subjects of an heretical king from their allegiance, made the king desirous of testing the loyalty of his more influential subjects. Yet not many years later his son's head rolled into the sand.

"Following that, Oliver Cromwell in his desperate efforts to find a legitimate basis for his dictatorial regime, demanded an oath preceding the election of parliament in 1653 that no one participating in the election would allow the constitution 'as settled in one person and parliament' to be disturbed. But Cromwell died and the oath was forgotten. The rupture which the oath was supposed to heal did not disappear until toleration and a liberal, truly

constitutional government had taught people how Catholic and Protestant, how parliamentary and authoritarian, how Whig and Tory could live peaceably together, with no one requiring the other to swear oaths which were either unnecessary or ineffectual.

"And where have oaths appeared in our own day? In Fascist Italy and in Nazi Germany. In both of these countries the dictators have promulgated requirements according to which the teachers and professors have to swear an oath of allegiance to the Duce, the Leader. But what, one may ask, was the object of demanding such a declaration from men who every day were obliged to mold their words and their teachings to the Fascist creed? The purpose was to humiliate or to destroy them. There were plenty of men who were known to the students as non-Fascists, non-Nazis. If they could be forced into swearing their allegiance to the official creed, they were morally discredited, they were shown to be trimmers. What is more, the man of integrity and of faith is the really dangerous enemy. He would not consent. He would protest. Gaetano Salvemini, now teaching at Harvard, is such a man. He knew the game of Mussolini and he left." Article entitled, "Teacher's Oaths," published in the January, 1936 issue of Harper's, Vol. 172 at p. 171.

At this point, I cannot refrain from quoting the words of warning contained in the powerful concurring opinion of Mr. Justice Black in *Wieman v. Updegraff*, 344 U.S. 183, 192, 73 S.Ct. 215, 219, 97 L.Ed. 216: "History indicates that individual liberty is intermittently subjected to extraordinary perils. \* \* \* The first years of our Republic marked such a period. Enforcement of the Alien and Sedition Laws by zealous patriots who feared ideas made it highly dangerous for people to think, speak, or write critically about government, its agents, or its policies, either foreign or domestic. Our constitutional liberties survived the ordeal of this regrettable period because there were influential men and powerful organized

groups bold enough to champion the undiluted right of individuals to publish and argue for their beliefs however unorthodox or loathsome. Today however, few people and organizations of power and influence argue that unpopular advocacy has this same wholly unqualified immunity from governmental interference. For this and other reasons the present period of fear seems more ominously dangerous to speech and press than was that of the Alien and Sedition Laws. Suppressive laws and practices are the fashion. The Oklahoma oath statute is but one manifestation of a national network of laws aimed at coercing and controlling the minds of men. Test oaths are notorious tools of tyranny. *When used to shackle the mind they are, or at least they should be, unspeakably odious to a free people.* Test oaths are made still more dangerous when combined with bills of attainder which like this Oklahoma statute impose pains and penalties for past lawful associations and utterances.

"\* \* \* Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended. *We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven.* And I cannot too often repeat my belief that the right to speak on matters of public concern must be wholly free or eventually be wholly lost." (Emphasis added.)

History is replete with accounts of the many stratagems created by tyrants to violate the individual's liberty. But it is also replete with accounts of man's constant warfare against these devices and victories won by courageous judges, legislators, administrators, lawyers, and citizens.

In 1787, the founders of this nation assumed that they had settled these matters for all time when they drew upon the lessons of history and wrote a Bill of Rights to assure the individual permanent freedom from official tyranny, and the right freely



to participate in the process of self-government.

"Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go *pari passu* with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition." Learned Hand, J., in *United States v. Kirschenblatt*, 2 Cir., 16 F.2d 202, 203, 51 A.L.R. 416.

"These specific grievances and the safeguards against their recurrence were not defined by the Constitution. They were defined by history. Their meaning was so settled by history that definition was superfluous. \* \* \* 'Upon this point a page of history is worth a volume of logic.' *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S.Ct. 506, 507, 65 L.Ed. 963." *Frankfurter, J., United States v. Lovett*, 1945, 328 U.S. 303, 321, 323; 66 S.Ct. 1073, 1081, 90 L.Ed. 1252.

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, in *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, and in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319) have declared the importance to *political liberty* and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties to the other fundamental rights of the individual citizen—the right to trial by jury, to the writ of habeas cor-

pus, and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly overzealous executive officers." *Gould v. United States*, 1920, 255 U.S. 298, 303, 41 S.Ct. 261, 263, 65 L.Ed. 647, *Clarke, J.* (Emphasis supplied.) See also: *Brandeis, J. dissenting, Olmstead v. United States*, 1927, 277 U.S. 438, 476, 478, 48 S.Ct. 564, 72 L.Ed. 944, and *Jones v. Securities and Exch. Comm.*, 1935, 298 U.S. 1, 28, 56 S.Ct. 654, 80 L.Ed. 1015.

"If there is any fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess*, by word or act their faith therein." *Jackson, J., in West Virginia State Board of Education v. Barnette*, 1943, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628. (Emphasis supplied.)

The story of the rise and fall of the *oath ex-officio* needs to be retold. It will be recalled that the early 1200's were marked by the adoption of this procedural device in the ecclesiastical courts. In this period the inquisitional oath began to take the place of the trial by compurgation oaths in the ecclesiastical courts. The compurgation trials conducted with the device of "oath helpers" had become little better than a farce. The new method of the *oath ex-officio* was one which pledged the accused to answer truly and was followed by a rational process of judicial probing by questions on the specific details of the affair. In a footnote by John H. Wigmore in 15 *Harvard Law Review* 615, it is stated that by the middle of the 13th century "the new oath became the customary instrument in the papal inquisition of heresy; which, indeed, owed its effectiveness largely to the new methods."

Liberals in the church courts insisted that the oath could only be imposed if the court had a rational hypothesis for proceed-



ing against the suspect. Such rational hypothesis could either be *fama publica* or *clamosa insinatio*. However, this was too mild for those who wanted a more vigorous pursuit of heretics and schismatics, and they finally prevailed in establishing the doctrine that the oath could be imposed by the church official *ex-officio* without any antecedent foundation. This extreme position, however, directly resulted in the downfall of the power of the ecclesiastical courts because of the public indignation it aroused.

The ordinary course of trial by the Inquisition was this. A man would be reported to the inquisitor as of ill-repute for heresy, or his name would occur in the confessions of some other prisoners. A secret inquisition would be made and all accessible evidence against him would be collected. When the mass of surmises and gossip, exaggerated and distorted by the natural fear of the witnesses, eager to save themselves from the suspicion of favoring heretics, grew sufficient for action, the blow would fall. The accused was then prejudged. He was assumed to be guilty, or he would not have been put on trial, and virtually his only mode of escape was by confessing the charges against him, abjuring heresy, and accepting whatever punishment might be imposed on him in the shape of penance. Persistent denial of guilt and assertion of orthodoxy, when there was evidence against him, rendered him an impenitent, obstinate heretic, to be abandoned to the secular arm and consigned to the state. See Henry Charles Lea, *A History of the Inquisition of the Middle Ages*, I, p. 407.

However, the English people early registered their resistance to general inquisitorial methods and their attendant abuses. A statute passed in 1360 in the reign of Edward III, provided, "that all general inquiries before this time granted within any seignories, for the mischiefs and oppression which have been done to the people by such inquiries, shall utterly cease and be repealed." 34 Edw. III, ch. 1.

But in 1583 the Court of High Commission in Causes Ecclesiastical, under the

leadership of Archbishop Whitgift, started a crusade against heresy wherever it could be found, examining suspected persons under oath in most extreme *ex-officio* style.

In 1609 Sir Edward Coke, as Chief Justice of Common Pleas, granted prohibition against the High Court of Ecclesiastical Causes in Edward's case. 13 Rep. 9. Edward had been charged with libel and the church court put him under the *ex-officio* oath to compel him to state his meaning of the libelous words he was accused of uttering. The common-law court took jurisdiction away from the church court upon the ground, among others, that "in cases where a man is to be examined upon his oath, he ought to be examined upon acts or words, and not of the intentions or thought of his heart; and if any man should be examined upon his oath of the opinion he holdeth concerning any point of religion, he is not bound to answer the same."

But the oath *ex-officio* persisted and the Court of the Star Chamber began during James' reign to use the *ex-officio* oath in stamping out sedition. Here the common-law courts were powerless to prevent employment of the oath procedure because they lacked jurisdiction over the Court of the Star Chamber.

In 1639 the Court of the Star Chamber examined John Lilburn, "Freeborn John," an opponent of the Stuarts, on a charge of printing or importing certain heretical and seditious books. Lilburn refused to answer questions "concerning other men, to insnare me, and to get further matter against me." The Council of the Star Chamber condemned him to be whipped and pilloried and his "boldness in refusing to take a legal oath," without which many offenses might go "undiscovered and unpunished." See 3 How. State Trials 1315, et seq.

The whip that lashed "Freeborn John" smashed the Court of the Star Chamber as well. In July, 1641, Parliament abolished the Court of the Star Chamber, the Court of High Commission for Ecclesiastical Causes, and provided by statute that no ecclesiastical court could thereafter admin-

ister an *ex-officio* oath on penal matters. In 1645 the House of Lords set aside Lilburn's sentence and in 1648 Lilburn was granted £3000 reparation for the whipping which he had received.

Meanwhile, the scene of struggle against oaths *ex-officio* was carried to colonial America. The story is well told by R. Carter Pittman in 21 Virginia Law Rev. 763 from which the following quotations are taken:

"The settlement of the English colonials in the new world took place at a time in English History when opposition to the *ex-officio* oath of the ecclesiastical courts was most pronounced, and at the period when the insistence upon the privilege against self-incrimination in the courts of common law had begun to have decided effect. \* \* \* The *ex-officio* oath, as employed in the ecclesiastical courts, which regulated the most intimate details of men's daily life, and more particularly by the Court of High Commission, was possibly the most hated instrument employed to create the unhappy plight of these Puritans and Separatists. \* \* \*

"About getting out of England there was much 'red tape' and it consisted in the most part of taking oaths—the oath of Supremacy and the oath of Allegiance, etc. For days and weeks thousands waited aboard ship in the river Thames until *this oath ordeal was over* and after that they were forced with a refined cruelty to say the prayers in the Anglican prayer books twice a day at sea. \* \* \*

The trial of Mrs. Ann Hutchinson before Governor Winthrop of Massachusetts in the year 1637 was recalled by Mr. Justice Black in *Adamson v. People of State of California*, 332 U.S. 46, at page 88, 67 S.Ct. 1672, at page 1694, 91 L.Ed. 1903, when he commented:

"Mrs. Hutchinson was tried, if trial it can be called, for holding unorthodox religious views. People with a consuming belief that their religious convictions must be forced on others rarely ever believe that the unorthodox have any rights which

should or can be rightfully respected. As a result of her trial and *compelled admissions*, Mrs. Hutchinson was found guilty of *unorthodoxy* and banished from Massachusetts. The lamentable experience of Mrs. Hutchinson and others, contributed to the over-whelming sentiment that demanded adoption of a *Constitutional Bill of Rights*. The founders of this Government wanted no more such 'trials' and punishments as Mrs. Hutchinson had to undergo. They wanted to erect barriers that would bar legislators from passing laws that encroached on the domain of belief, and that would, among other things, strip courts and *all public officers of a power to compel people to testify against themselves.*" (Emphasis supplied.)

But the ingenuity of those who would use the oath against the unorthodox was undaunted.

See *Harrison v. Evans*, 1 English Reports, 1437, decided by the House of Lords in 1767. Evans was a Protestant Dissenter and this fact was known to the Lord Mayor of London. Nevertheless, the Mayor appointed Evans to fill a vacancy as sheriff, despite the existence of an act providing that no person should be admitted to any office who had not, within the twelve preceding months "received the sacrament of the Lord's Supper according to the rites of the Church of England." Because of this statute Evans could not take the oath of office or assume it, and he was assessed for a statutory penalty of £600 which was made applicable to any citizen who refused to assume an office after being appointed thereto.

The House of Lords, by a 6 to 1 vote, ruled with the dissenting Evans, overturned the judgments of the lower courts and returned to him his £600.

"*Test oaths, designed to impose civil disabilities upon men for their beliefs rather than for unlawful conduct were an abomination to the founders of this nation.*" This feeling was made manifest in Article VI of the Constitution which provides that *'no religious Test shall ever be required as a Qualification to any Office or public Trust*



*under the United States.*" Black, J. dissenting. In re Summers, 1945, 325 U.S. 561, 576, 65 S.Ct. 1307, 1315, 89 L.Ed. 1795. (Emphasis supplied.)

"No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, that the religious test oath or the restrictions upon assembly then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing." (Emphasis supplied.) Bridges v. State of California, 1941, 314 U.S. 252, at page 265, 62 S.Ct. 190, at page 194, 86 L.Ed. 192.

It is revealing to note that test oaths and the struggle against them arose at a time when the division between church and state was in its early stages, when the separation was far from complete. The immunity from compulsory disclosure which ultimately developed affected not only the right of the individual to worship as he pleased but also his right, notwithstanding his place or mode of worship, to hold political office. The protection accorded religious belief developed hand in hand with nonsectarianism in government.

This policy has been recognized in the United States. While the original purpose behind the abolition of the test oath may have been to further religious liberty, the effect has been to extend political liberty. The following statement is illustrative: "This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience. Cf. Pierce v. Society of the Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 \* \* \*. Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human

interest." Thomas v. Collins, 323 U.S. 516, 531, 65 S.Ct. 315, 323, 89 L.Ed. 430.

The California 1897 Direct Primary Act permitted political parties to require persons, as a condition of voting at the primary, to give an oath that they would thereafter support the nominees of that party. That statute was declared unconstitutional and the Supreme Court, in Spier v. Baker, 1898, 120 Cal. 370, at page 379, 52 P. 659, at page 663, 41 L.R.A. 196, said: " \* \* \* And the moment you recognize the existence of power in the legislature to create tests in these primary elections, you recognize the right of the legislature to create any test which to that body may seem proper. While the test prescribed in this act, may be said to be a most reasonable one, yet the right to make it carries with it the right to make tests most unreasonable. If the power rests in the legislature to create a test, then the power is found in a Democratic legislature to make the test at a primary election a belief in the free coinage of silver at the ratio of sixteen to one, and the same power is found in a Republican legislature to make the test a belief in a protective tariff. If such a power may be sustained under the constitution, then the life and death of political parties are held in the hollow of the hand by a state legislature."

In Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430, the same thought is expressed: "But it cannot be the duty, because it is not the right of the state, to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." (Emphasis supplied.)

In the light of the foregoing discussion, let us consider the attacks made by plaintiff upon the oath here required. It is contended, with merit, that the oath here is unconstitutional in that it violates the equal

protection clauses of both the federal and state Constitutions, and that it also violates the First Amendment to the Constitution of the United States. Section 32 makes an exception insofar as the householder's \$100 exemption on personal property is concerned. While it cannot be denied that the Legislature in its wisdom may classify in order that certain evils may be avoided in the future; such classification must bear a reasonable relation to the evil to be avoided. There is here no reasonable classification when the evil to be avoided is considered. There is no evidence that any of the churches or veterans here involved advocated, or intended to advocate, the forbidden political philosophy. The constitutional amendment and section 32 appear to be a sort of shotgun attempt on the part of the Legislature to hit an undefined object. In other words, there is no relation between the object to be achieved and the tactics taken to achieve it. A statement made in the majority opinion clearly shows the fallacy in the entire affair. That statement reads as follows: "By its enactment [section 19 of article XX] the people of the state declared the public policy of withholding from the owners of property in this state *who engage in the prohibited activities* the benefits of tax exemption. The denounced activities are criminal offenses under state law (Stats.1919, p. 281), and the act of Congress known as the Smith Act (54 Stat. 670) makes it unlawful to advocate the overthrow of the government by force and violence." 311 P.2d 513. It should be emphatically stated and understood that not one of the churches or veterans here involved has been so much as accused of subversive activities. But through their refusal to take the unconstitutional (as I believe) oath, they are penalized in advance for something they have not done and will, in all probability, never do. By the majority opinion we are informed that the reason for the oath is to protect state revenues from impairment by those who would seek to destroy it by unlawful means. An entirely different situation would be presented had any of those involved sought to destroy

the state, but here only future *highly problematical* activity is forsworn although the tax is levied for past ownership of property to which the exemption was applicable. Just why charitable institutions are singled out as presenting the greatest danger to this country in time of peace or war is not made clear in the majority opinion. It is Hornbook law that legislation classifying certain groups for corrective purposes must bear a reasonable relationship to the object to be achieved. Churches would, indeed, seem to me to be the least likely subjects of classification for legislative measures to correct the evil thought to exist. Veterans, also, are those who have risked their lives or have been willing to risk them to uphold the ideals for which this country stands. The exemptions were granted, in the first instance, so that religious work might be carried on with the least amount of tax burden possible to the end that the money saved thereby might be used to promote the general welfare; in the second instance, to veterans because they gave up homes, families, and positions to promote the general welfare insofar as protecting this country from an enemy was concerned. It hardly seems logical to assume that laws removing the tax exemptions from those dedicated to the promotion of the general welfare because they *might*, in the future, decide to do a turn-about-face and *destroy* the general welfare can be said to be a reasonable classification. If there is one principle that has always (heretofore) been clearly understood in this country it is that every person is presumed innocent until proven guilty beyond a reasonable doubt. The legislation involved here presumes that one refusing to sign the oath has been, or will soon be, guilty of treasonable conduct. From what is said in the majority opinion it appears that this thought did occur to the members of the court signing it. We are informed that there is a presumption of innocence but that the assessor, because of it, is not relieved from making the investigation enjoined on him by law; that his administrative determination is not binding on the tax exemption claimant "but it is sufficient to authorize



him to tax the property as non-exempt and to place the burden on the claimant to test the validity of his administrative determination in a court of law." What is this but forcing the supposedly subversive organization or person to prove itself or himself innocent beyond a reasonable doubt?

. In testing the reasonableness of the laws under attack here, the next question which presents itself is why are householders excepted from those who must take the oath before any tax exemption is allowed them? We are told that the "segment of householders in this state is so overwhelmingly large as compared with others chosen for exemption that the cost of processing them would justify their separate classification."

If this class is so "overwhelmingly large" it would appear that if the old adage "in numbers lie strength" is true, that this class should also be required to take the oath prior to claiming the exemption. It would also appear that mere difficulty in "processing" would be of little moment in an undertaking thought to be so vitally necessary. Furthermore, if the principle behind the oath is, as we are told, to prevent those dangerous persons from depleting the state's revenues, it would appear that this "overwhelmingly large" class might, even though the exemption is a relatively small one, deplete it even more than the revenues from those which fall within the legislation. The Supreme Court of the United States said, (*Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37, 48 S.Ct. 423, 425, 72 L.Ed. 770) that "The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, *Kentucky Railroad Tax Cases* [*Cincinnati, N. O. & T. P. R. Co. v. Commonwealth of Kentucky*], 115 U.S. 321,

337, 6 S.Ct. 57, 29 L.Ed. 414; *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 293, 18 S.Ct. 594, 42 L.Ed. 1037, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. *County of Santa Clara v. Southern Pac. R. Co.*, C.C., 18 F. 385, 388-399; *The Railroad Tax Cases*, C.C., 13 F. 722, 733. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always that the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. [Commonwealth of] Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989; *Star-way [Electric Appliance] Corp. v. Day*, 266 U.S. 71, 85, 45 S.Ct. 12, 69 L.Ed. 169; *Schlesinger v. [State of] Wisconsin*, 270 U.S. 230, 240, 46 S.Ct. 260, 70 L.Ed. 557. That is to say, mere difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155, 17 S.Ct. 255, 257, 41 L.Ed. 666."

There is in my mind no doubt whatsoever that the legislation with which we are here concerned bears no relation whatsoever to the objective to be achieved. Presumably that objective is to stamp out, by any means at hand, the promulgation of unpopular ideas. While the idea of the overthrow of the government of this country by force and violence in either peace or war is as abhorrent to me as it is to the majority of Americans, I am at a complete loss when it comes to imagining any reasonable theory on which the legislation in question can be considered an effective way of preventing such action. The tax itself is on property owned by churches and used for religious purposes and the



exemption applies only when such property is used for such purposes. So far as the veteran's exemption is concerned, the tax to which it applies is also on property. Property taxes and unpopular beliefs or advocacy would appear to be as far apart as the poles and to bear no reasonable relationship one to the other. The classification here involved falls directly within the rule of the Louisville Gas case; it is arbitrary, it does not rest upon a difference bearing a reasonable and just relation to the act in respect to which the classification is proposed; it is a mere difference which "is not enough."

*The Oath Is a Violation of the Constitutional Guarantee of Freedom of Speech:*

In *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal.2d 536, 542, 171 P.2d 885, 889, we held that "Freedom of speech and of peaceable assembly are protected by the First Amendment of the Constitution of the United States against infringement by Congress. They are likewise protected by the Fourteenth Amendment against infringement by state Legislatures. *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430; *De Jonge v. [State of] Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.Ed. 278. *However reprehensible a Legislature may regard certain convictions or affiliations, it cannot forbid them if they present no 'clear and present danger that they will bring about the substantive evils' that the Legislature has a right to prevent.* 'It is a question of proximity and degree.' *Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470. The United States Supreme Court has been live to the difference between negligible dangers and substantial ones, between remote dangers and immediate ones. \* \* \* Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be "substantial", *Brandeis, J.*, concurring in *Whitney v. [People of State of] California*, supra, 274 U.S. at page 374, 47 S.Ct. at page 647; it must be "serious", *Id.*, 274 U.S. at page

376, 47 S.Ct. at page 648. And even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression \* \* \*". *Bridges v. State of California*, 314 U.S. 252, 261, 62 S.Ct. 190, 86 L.Ed. 492, quoting from the concurring opinion of Mr. Justice Brandeis in *Whitney v. People of State of California*, 274 U.S. 357, 374, 47 S.Ct. 641, 71 L.Ed. 1095.

A reading of the majority opinion leaves in the minds of the reader the implication that the "clear and present danger" rule was abrogated by the later case of *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 867, 95 L.Ed. 1137. In the *Dennis* case it was specifically noted by the court that in the Smith Act "Congress did not intend to eradicate the free discussion of political theories; to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in which the evidence showed these petitioners engaged." It will be recalled that we have here no evidence that the churches and veterans involved were even so much as accused of the forbidden activities. In the *Dennis* case the petitioners had been found guilty by a jury of organizing a Communist party in the United States; in knowingly and wilfully teaching and advocating the overthrow of our government by force and violence. The court also held that it had been determined that the evidence amply supported the necessary finding of the jury that the petitioners "were . . . going to work within our framework of democracy, but intended to initiate a violent revolution whenever the propitious occasion appeared." In the majority opinion in the *Dennis* case it was said that "Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech" and speaking of the "clear and present danger" rule it was said "Obviously, the words cannot

mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. *If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.*" (Emphasis added.) The court expressly rejected the contention that success or probability of success in overthrowing the government was the criterion. The court then, in speaking of prior cases, said that the court had not been "confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis." The Supreme Court then stated the rule, relied upon by the majority here, that "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." This rule, following the court's language concerning what constituted a "clear and present" danger and read in the light of the facts as they were stated in the Dennis case, shows the absurdity of this tempest-in-a-teapot with which we are here confronted: there is no showing that the churches and veterans were highly organized into a war-like machine dedicated to the overthrow of the government by force and violence with leaders highly trained and ready to give the "word" when the time was ripe for revolution! The objects of the legislation, the objective and the means used to achieve it are completely unrelated. Where is the "danger" so far as churches and veterans are concerned? And does the denial of a charitable exemption constitute a reasonable attempt to save this country from revolution? Or does the oath involved just constitute an unconstitutional invasion of freedom of speech? In my opinion it constitutes an unconstitutional invasion of freedom of speech with the absurdity of the entire situation pinpointed by the thought that any embryo revolution-

ist would surely not hesitate to subscribe to such an oath.

As Mr. Justice Douglas said in his dissenting opinion in the Dennis case, "Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart.

"Full and free discussion has indeed been the first article of our faith. We have founded our political system on it. It has been the safeguard of every religious, political, philosophical, economic, and racial group amongst us. We have counted on it to keep us from embracing what is cheap and false; we have trusted the common sense of our people to choose the doctrine true to our genius and to reject the rest. This has been the one single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen. We have above all else feared the political censor. We have wanted a land where our people can be exposed to all the diverse creeds and cultures of the world.

"There comes a time when even speech loses its constitutional immunity. Speech innocuous one year may at another time fan such destructive flames that it must be halted in the interests of the safety of the Republic. That is the meaning of the clear and present danger test. When conditions are so critical that there will be no time to avoid the evil that the speech threatens, it is time to call a halt. Otherwise, free speech which is the strength of the Nation will be the cause of its destruction.

"Yet free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate opposition against the speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed."

Mr. Justice Douglas said that "If this were a case where those who claimed protection under the First Amendment were teaching the techniques of sabotage, the as-

assassination of the President, the filching of documents from public files, the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality. This case was argued as if those were the facts. The argument imported much seditious conduct into the record. That is easy and it has popular appeal, for the activities of Communists in plotting and scheming against the free world are common knowledge. But the fact is that no such evidence was introduced at the trial." The books on Leninism and Communism, etc., which were involved in the Dennis case were commented on by Mr. Justice Douglas as follows: "Those books are to Soviet Communism what Mein Kampf was to Nazism. If they are understood, the ugliness of Communism is revealed, its deceit and cunning are exposed, the nature of its activities becomes apparent, and the chances of its success less likely. That is not, of course, the reason why petitioners chose these books for their classrooms. They are fervent Communists to whom these volumes are gospel. They preached the creed with the hope that some day it would be acted upon." Mr. Justice Douglas then continued: "The vice of treating speech as the equivalent of overt acts of a treasonable or seditious character is emphasized by a concurring opinion [Mr. Justice Jackson], which by invoking the law of conspiracy makes speech do service for deeds which are dangerous to society. \* \* \*

I repeat that we deal here with speech alone, not with speech *plus* acts of sabotage or unlawful conduct. Not a single seditious act is charged in the indictment. To make a lawful speech unlawful because two men conceive it is to raise the law of conspiracy to appalling proportions. That course is to make a radical break with the past and to violate one of the cardinal principles of our constitutional scheme."

I repeat that in the case at bar we haven't even had speech let alone any facts.

Neither prejudice nor hate nor senseless fear should be the basis for abridging freedom of speech. "Free speech—the glory of our system of government—should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent."

American democracy is no accident; it is the majestic product of a vigorous, experimental and passionate history. This nation came into existence as the result of a purposeful struggle against governmental tyranny. The heritage of Thomas Jefferson—"Rebellion to Tyrants is obedience to God"—remains with us, embodied in our institutions and traditions. The spirit of Inquisition, which was abjured in the Declaration of Independence, has always been obnoxious to our political and social life. Equally, it has found no tolerance in our legal codes, our legal traditions, our juridical morality. Due process has meant a fair, legal process. Liberty has meant genuine, concrete liberty for the individual citizen—his right to freedom from search and seizure, his right to privacy, his right to be free of persecutory inquisition on grounds of race, color, creed, political opinion or association.

At this truly grave moment in our nation's growth it is in the power of this court to speak forthrightly in the language of Coke, Camden, and Bradley, in the language of the many illustrious jurists for whom the frenzy of the political marketplace never blurred the meaning of freedom.

"Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. \* \* \* No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion." Chambers v. State



of Florida, 1940, 309 U.S. 227, 241, 60 S. Ct. 472, 479, 84 L.Ed. 716.

What is required at this moment of this court is not innovation, but rather a re-statement of the glowing principles by which the history of the western world has given dignity to its citizens: "Historic liberties and privileges are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' \* \* \*. A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price." Cardozo, J., Matter of Doyle, 257 N.Y. 244, 268, 177 N.E. 489, 498; 87 A.L.R. 418.

The issue is momentous, of far-reaching implication, and the ruling of the court will be a categorical imperative whose cumulative effect will be seen only in the fullness of time. "Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole. The dangers are not fanciful. We too readily forget them. Recollection may be refreshed as to the happenings after the first World War by the 'Report upon the Illegal Practices of the United States Department of Justice', which aroused the public concern of Chief Justice Hughes (then at the bar), and by the little book entitled 'The Deportations: Delirium of Nineteen-Twenty' by Louis F. Post, who spoke with the authoritative knowledge of an Assistant Secretary of Labor." Frankfurter, J., dissenting, Harris v. United States, 1947, 331 U.S. 145, 173, 67 S.Ct. 1098, 1112, 91 L.Ed. 1399.

Devotion to Americanism often calls for something other than conformity. The plaintiff in the present case knew that to protect the Constitution, indeed merely to invoke its protection for all Americans, required courage, and that hardihood to challenge a wrong done under color of authority was as indispensable to good citizenship as would be, in other circumstances, unquestioning obedience. President Thomas Jefferson wrote to Benjamin Rush

in a letter dated April 21, 1803: "It behooves every man who values liberty of conscience for himself, to resist invasions of it in the case of others; or their case may, by change of circumstances, become his own. *It behooves him, too, in his own case to give no example of concession, betraying the common right of independent opinion, by answering questions of faith which the laws have left between God and himself.*" (Emphasis supplied.)

In the last analysis, when the moment of decision comes, to the private citizen as well as to the judge, it is in the quiet of his own mind and in the glow of his own courage that Americanism thrives. And it is in the cumulative decision of millions, citizen as well as official, that Americanism is reborn each moment.

For the foregoing reasons, I would reverse the judgment.

Rehearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.



**The PEOPLE'S CHURCH of SAN FERNANDO VALLEY, Inc., Plaintiff and Respondent,**

**v.**

**COUNTY OF LOS ANGELES, California; City of Los Angeles, California; H. L. Byram, County Tax Collector, Defendants and Appellants.**

**L. A. 23790.**

**Supreme Court of California,  
In Bank.**

**April 24, 1957.**

**Rehearing Denied May 22, 1957.**

Action to recover taxes paid under protest. The Superior Court, Los Angeles County, Philbrick McCoy, J., rendered judgment for plaintiff, predicated upon conclusions that Revenue and Taxation Code section, requiring nonsubversive declarations from property tax exemption applicants, was invalid by reason of exclusion

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# Supreme Court of the United States



October Term, 1957

No. 382

THE FIRST UNITARIAN CHURCH OF LOS ANGELES, a corporation,  
*Petitioner;*

*vs.*

COUNTY OF LOS ANGELES, CITY OF LOS ANGELES, H. L.  
BYRAM, COUNTY OF LOS ANGELES TAX COLLECTOR, and  
JOHN R. QUINN, COUNTY OF LOS ANGELES ASSESSOR.

No. 385

VALLEY UNITARIAN—UNIVERSALIST CHURCH, INC.,

*Petitioner,*

*vs.*

COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF LOS  
ANGELES, CALIFORNIA; H. L. BYRAM, COUNTY TAX  
COLLECTOR.

## PETITIONERS' CONSOLIDATED OPENING BRIEF.<sup>1</sup>

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IN THE  
**Supreme Court of the United States**

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October Term, 1957

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No. 382

THE FIRST UNITARIAN CHURCH OF LOS ANGELES, a corporation,  
*Petitioner,*

*vs.*

COUNTY OF LOS ANGELES, CITY OF LOS ANGELES, H. L.  
BYRAM, COUNTY OF LOS ANGELES TAX COLLECTOR, and  
JOHN R. QUINN, COUNTY OF LOS ANGELES ASSESSOR.

---

No. 385

VALLEY UNITARIAN—UNIVERSALIST CHURCH, INC.,

*Petitioner,*

*vs.*

COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF LOS  
ANGELES, CALIFORNIA; H. L. BYRAM, COUNTY TAX  
COLLECTOR.

---

**PETITIONERS' CONSOLIDATED OPENING  
BRIEF.<sup>1</sup>**

---

**Opinions Below.**

In No. 382, the trial court rendered no written opinion.  
In No. 385, the opinion of the trial court, dictated orally  
from the bench, appears in the record at R.V. 12-18. It is

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<sup>1</sup>The two cases were consolidated by order of this Court. [R.F. 90; R.V. 22.] References to the record in No. 382, the First Unitarian Church case, will be: R.F. References to the record in No. 385, the Valley Unitarian—Universalist Church case, will be: R.V. By order of this Court [R.V. 23], the name of the petitioner in the caption of No. 382 was changed from Peoples' Church of San Fernando Valley, Inc., as it was designated in the petition for writ of certiorari, to its present form because the name of the church had been changed subsequent to the start of this litigation.

not reported. The opinions of the court below [R.F. 35; R.V. 20] are reported in 48 Cal. 2d 419 and 899, 314 P. 2d 508 and 540; the opinions of the dissenting justices in the court below [R.F. 57, 65; R.V. 21, 22] are reported in 48 Cal. 2d at 443, 451 and 900, 311 P. 2d at 522, 527 and 542.

### **Jurisdiction.**

These are reviews of judgments [R.F. 57; R.V. 21] of the Supreme Court of the State of California in civil cases entered on April 24, 1957 [R.F. 35; R.V. 20]. Timely filed [R.F. 89; R.V. 22] petitions for rehearing were denied on May 22, 1957 [R.F. 89; R.V. 22], Chief Justice Gibson and Justices Carter and Traynor being of the opinion that the petitions should be granted [*ibid*].

Jurisdiction of this court is invoked under 28 U. S. C. 1257(3). The petitions for writs of certiorari were timely filed (Rule 22[3], this court; 28 U. S. C. 2101(c)), on August 19 and 20, 1957 [R.F. and V, cover pages]. This court granted certiorari on October 21, 1957 [R.F. 90; R.V. 22].

### **Constitutional Provisions and Statutes Involved.**

Only the citations of the constitutional and statutory provisions are included here. The full text is set forth in Appendix A attached hereto. The citations are as follows:

California Church exemption:

Cal. Const., Art. XIII, Sec. 1½;

California Church Loyalty Oath:

Cal. Rev. and Tax. Code, Sec. 32 (Cal. Stats. 1953, ch. 1503, p. 3114, Sec. 1);



California Church non-exemption provision based on advocacy:

Cal. Const., Art. XX, Sec. 19(b).;

U. S. Const., 1st Amend.;

U. S. Const., 14th Amend., Sec. 1;

U. S. Const., Art. VI, Cl. 2.

### Questions Presented for Review.

1. Does Section 32 of California Revenue and Taxation Code (Cal. Stats. 1953, ch. 1503, p. 3114, Sec. 1) which takes away the traditional tax exemption from a church which does not sign an oath reading that it

does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign Government against the United States in event of hostilities

on its face, and as construed and applied to the petitioning churches, violate:

(a) the freedom of religion, speech or assembly guarantees of the 1st and 14th Amendments to the Constitution; or

(b) the due process clause of the 14th Amendment to the Constitution; or

(c) the equal protection clause of the 14th Amendment?

2. Does Article XX, Section 19(b) of the California Constitution which takes away the traditional tax exemption from a church "which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the



support of a foreign Government against the United States in the event of hostilities," on its face, and as construed and applied to the petitioning churches violate federal constitutional rights as set forth above as to Section 32?

3. Do said Section 32 of the California Revenue and Taxation Code and/or Article XX, Section 19(b) of the California Constitution on their face and as construed and applied to the petitioning churches violate the supremacy clause, Article VI, Clause 2, of the Constitution?

### Statement of the Case.

The facts are not in dispute, the allegations in the complaints [R.F. 1-32; R.V. 1-7] being admitted by the general demurrers [R.F. 33; R.V. 7-8] and, in No. 382, by respondents' stipulation [R.V. 19] that they do not contravert any of the allegations of fact in the complaint.

Petitioners are churches [R.F. 1; R.V. 1]. Respondents are the taxing bodies and tax authorities [R.F. 1-2; R.V. 1-2] of the area in which are located real property and the church buildings thereon owned by petitioners [R.F. 2, 7; R.V. 2]. Said property is used solely and exclusively for religious worship [R.F. 2, 7; R.V. 2]. Under Article XIII, Section 1½ of the California Constitution, by reason of said sole and exclusive use for religious worship, said property is entitled to tax exemption [R.F. 3, 8; R.V. 2]. Respondents refused to allow petitioners the church tax exemption [R.F. 4, 9; R.V. 3] not because the churches did, nor even because respondents claim they did, advocate either of the doctrines proscribed by Article XX, Section 19 of the California Constitution [R.F. 56],

but solely because petitioners struck out and refused to execute that part of the tax form [R.V. 19] which required the oath as to non-advocacy mentioned in Section 32 of the California Revenue and Taxation Code [R.F. 3-4, 8; R.V. 3]. Respondents thereupon demanded payment of the taxes [R.F. 4, 9; R.V. 3].

Thereafter, pursuant to the provisions of California law (Rev. & Tax. Code, Secs. 5136-5137), for testing the validity of taxes assessed, petitioners paid the taxes under protest [R.F. 4, 9; R.V. 4], claiming that the state constitutional provision (Art. XX, Sec. 19(b)) and the legislative section (Rev. & Tax Code, Sec. 32) requiring the oath of non-advocacy as a condition of tax exemption, were violative, *inter alia*, of the various federal constitutional guarantees heretofore set forth [R.F. 5-6, 10-11; R.V. 4]. Included in the "Protest of Tax Payment" filed by petitioner in No. 382 was the statement of one of the principles of the church [R.F. 14, 23]:

"The principles, moral and religious, of the First Unitarian Church of Los Angeles compel it, its members, officers and minister, as a matter of deepest conscience, belief and conviction, to deny power in the state to compel acceptance by it or any other church of this or any other oath of coerced affirmation as to church doctrine, advocacy or beliefs."

Thereafter, as provided by California law (Rev. & Tax. Code, Secs. 5138-5139), these suits were filed for recovery of the taxes thus paid under protest and for declaratory judgment to the effect that the denial of the church tax exemption to petitioners was illegal and void [R.F. 12; R.V. 4].

The trial court in No. 382 sustained respondents' demurrer without leave to amend and entered judgment for respondents dismissing the action [R.F. 34]. In No 385, the trial court ruled against petitioner on the federal questions [R.V. 13], but entered judgment in favor of petitioner [R.V. 10], on a state ground [R. 17] and ordered refund of the taxes paid [R. 10].

On appeal the court below, 4-3, affirmed No. 382 [R.F. 57] and by the same vote reversed No. 385 [R.V. 21]. Chief Justice Gibson and Justice Traynor, dissenting, disagreed, stating [R.F. 57; R.V. 21]: "Section 19 of article XX of the California Constitution and section 32 of the Revenue and Taxation Code unjustifiably restrict free speech." Justice Carter, in separate dissenting opinions [R.F. 65; R.V. 22] held that the oath violated the equal protection clause of the 14th Amendment as well as the guarantee of freedom of speech, and by his reliance upon Jefferson's statement that "Rebellion to Tyrants is Obedience to God," the guarantee of freedom of religion as well.

### **Summary of Argument.**

1. The provisions here involved violate the due process clause of the 14th Amendment on a number of grounds.

The advocacy that is proscribed is couched in language that is too vague and indefinite to withstand constitutional due process attack.

Free speech is abridged because the danger to the legitimate interest the state has a right to protect is far outweighed by the interest involved in permitting the speech.

Additionally the court below, contrary to decisions of this Court, has construed the provisions prohibiting advocacy of overthrow of the government by force and violence so as to prohibit mere advocacy of doctrine and did not confine the statute within the necessary constitutional limits permitting only proscription of incitement to action. In short, California has penalized views, by means of the tax penalty, not because of any danger to the state, but because the views are disapproved of.

The oath violates freedom of religion by compelling the church, on pain of loss of tax exemption, to confess as to its non-advocacy. This breaches the Wall of Separation because the state has no right to require any confession of faith from a church; it exacts a price from churches which refuse to follow state orthodoxy and rewards churches which do. Moreover, the oath here is essentially the same as the historic English test oaths whose demise it was thought the First Amendment had accomplished. And in compelling the church by oath to give up its right of moral judgment, the state has unconstitutionally invaded the sphere of the intellect and spirit.

The provisions here attacked also violate due process in ways in addition to vagueness. They are arbitrary in that there is no danger to the state which requires that free speech be impinged upon. Moreover, the means adopted (abjuration of advocacy) have no relationship to the end sought (the raising of revenue). Even assuming the primary purpose of the oath to be the protection of the state from possible overthrow, the means chosen bear no reason-



able relationship to that end. If history teaches anything, such means actually increase the danger to the state, as suppression of free discussion necessarily renders it less probable that those entertaining false views will have the chance to hear such views challenged in free debate and to hear true and correct views expressed. Likewise, innocent with knowing activity have been lumped together and penalized. Due process does not permit this indiscriminate classification. The oath creates a conclusive presumption of guilt, a procedure which itself is arbitrary.

Equal protection is also offended, because the classification (unpopular advocacy vs. property taxes) have no reasonable relationship to each other.

2. The Federal Supremacy Clause has been violated because (a) in the matter of advocacy of overthrow, the Congressional plan has left no room for state implementation, (b) the field, especially of advocacy of support of a foreign government against the United States during war time, is so closely a matter of Federal concern as to preclude state enforcement on the subject and (c) state enforcement presents a serious danger of conflict with the federal program—the very thing that happened here.



## ARGUMENT.

### I.

Section 19(b) of Article XX of the California Constitution and Section 32 of the California Revenue and Taxation Code Violate the 14th Amendment to the United States Constitution.<sup>2</sup>

#### A. The Provisions Offend Due Process Because They Are Vague, Indefinite and Uncertain.

The phrase "does not advocate the support of a foreign government against the United States in (the)<sup>3</sup> event of hostilities" does not have the preciseness of meaning, the clarity of import which a statute, admittedly dealing in the field of, restricting, and penalizing free speech, must have. It does not tell the reader what he may advocate and what he may not. It offends, therefore, against the "vice of vagueness" principle.<sup>4</sup>

It is impossible for a minister in reading the phrase to be able to tell, in order that his church not be penalized by loss of tax exemption, what he may or may not say.

Does the phrase, for example, cover a Rabbi, during the recent hostilities in Egypt, preaching that England was right in her actions and that the United States was wrong

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<sup>2</sup>For ease of reference, the state constitutional provision will be referred to as Article XX, and the state statute as Section 32.

<sup>3</sup>The statute does not contain the article.

<sup>4</sup>*Winters v. New York*, 333 U. S. 507; *Lanzetta v. New Jersey*, 306 U. S. 451; *United States v. Cardiff*, 344 U. S. 174; *Thornhill v. Alabama*, 310 U. S. 88; *Hague v. CIO*, 307 U. S. 496; *Burstyn v. Wilson*, 343 U. S. 494; *Herndon v. Lowry*, 301 U. S. 242; *Connally v. General Construction Co.*, 269 U. S. 385; *Champlin Refining Co. v. Commission*, 286 U. S. 210; *United States v. L. Cohen Grocery Co.*, 255 U. S. 81; *Stromberg v. California*, 283 U. S. 359; cf. *Watkins v. United States*, 354 U. S. 178.

in condemning her? Does the phrase cover this same Rabbi's advocating that all moral support be given to Israel and that weapons be sent her despite the fact that the United States had banned such shipments? Does it proscribe, on pain of loss of tax exemption, a Catholic priest's advocating from his pulpit that in the event the United States, without provocation, attacks and takes over the Vatican, that such action was improper and that the United States should leave? Some Americans advocate the admission of Communist China to the United Nations (Address by Professor Louis B. Sohn before Los Angeles Town Hall, July 23, 1957 [19 Town Hall Bulletin, No. 31, Aug. 6, 1957]). Does the situation extant between Communist China and Nationalist China come within the meaning of the word "hostilities"? If so, is such advocacy forbidden? During the Korean conflict, Quakers advocated loving and feeding our enemies in North Korea (*The Churchman*, April 1, 1954, p. 6). Does such advocacy come within the prohibition? Does the phrase interdict only the formal charter or pronouncements of the corporate church body? Or are only the minister's utterances proscribed? Or is he exempt? Does the phrase outlaw advocacy of moral support? Or financial? Or just physical? Is only wartime advocacy condemned or is peacetime advocacy with reference to what should be done during hostilities (whatever they may be) if ever they break out, and no matter how remote, and no matter between what countries, likewise condemned? What is meant by "against the United States"? Is a position contrary to, or in criticism of, a policy enunciated by the Secretary of State or the President or Congress, "against the United States"?

A reading of the phrase gives no answer to these questions. Nor does the phrase come here clothed with an

authoritative narrow state interpretation. (*Cf.*, *Cox v. New Hampshire*, 312 U. S. 569, 575; *Kingsley Books v. Brown*, 354 U. S. 436.) The statute does not narrowly define its terms, nor does the legislative history.<sup>5</sup> Though requested, the court below refused to construe the phrase narrowly, saying only [R.F. 40]:

“Its provisions are plain and unambiguous and require no interpretation in the matter of their prohibitions.”

The phrase is not, therefore, like “overthrow of the government by force and violence” which the courts have construed and narrowly defined (*American Communications Association v. Douds*, 339 U. S. 382; *Dennis v. United States*, 341 U. S. 494; *Yates v. United States*, 354 U. S. 298). Even as to this latter phrase, *cf.*, *Sweezy v. New Hampshire*, 354 U. S. 234, holding as too broad because too remote, a definition of a “subversive person,” as being one who “by any means aids in the commission of any act intended to assist in the alteration of the constitutional form of government by force or violence.” And *cf.*, Mr. Justice Frankfurter, in *American Communication Association v. Douds*, 339 U. S. 382, 420, dissenting from that part of the opinion upholding an oath that one “does not believe in, and is not a member of or supports any organization that believes in . . . the overthrow of the

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<sup>5</sup>The official arguments presented to the voters when Article XX was voted upon, said nothing which gave any meaning to the phrase here being discussed. The pamphlet containing these arguments (it is entitled: “Proposed Amendments to Constitution—Propositions and Proposed Laws together with arguments—to be submitted to the electors of the State of California at the General Election—Tuesday, Nov. 4, 1952”) has, for the convenience of the Court, been lodged with the Clerk. Article XX was submitted as Proposition 5. The arguments appear on pages 6 and 7 of the document.

United States Government . . . by any illegal or unconstitutional means." He said:

"It is asking more than rightfully may be asked of ordinary men to take oath that a method is not 'unconstitutional' or 'illegal' when constitutionality or legality is frequently determined by this Court by the chance of a single vote."

In the latter case of *Osman v. Douds*, 339 U. S. 846, this Court was equally divided as to the validity of that phase of the avowal. The provisions here involved contain virtually the same phraseology: "or other unlawful means."

In the face of the language of the provisions at bar as to either of the proscribed advocacies, the only way the church can be sure that its exemption will not be taken away is to submit its sermons or its doctrines to the tax assessor to get a license, so to speak, in advance. (Cf., *Staub v. City of Baxley*, 355 U. S. . . ., 26 Law Week 4079.) And since a statute such as this is normally enforced during periods of strong feeling, the safest thing to do is not to advocate at all.

#### **B. The Provisions Abridge the Right to Freedom of Speech.**

The majority in the court below acknowledged that the provisions here involved infringed upon the right of free speech but asserted that such infringement was permissible and not unconstitutional. It becomes necessary, therefore, as the majority below correctly pointed out [R.F. 51] to balance the conflict of interests involved—that of the right of the individual "to speak out as against the harm or injury society may suffer as a result of such



speech" [ibid].<sup>6</sup> But it is in the balancing of this conflict of interests that the majority below erred.

In sustaining the validity of Article XX against constitutional attack on free speech grounds, the majority considered the state interest to be protected as being [R.F. 46] "merely a declaration of state policy with reference to its own tax structure" to the end that [R.F. 41] owners of property in the state who engage in advocacy of the overthrow of the government by force and violence<sup>7</sup> shall have withheld from them the benefits of tax exemption. The majority took pains to point out [R.F. 46] that the Article prescribes no penal sanctions.<sup>8</sup> Thus even in the majority's own view there is no danger to the State. The provision is simply a penalty in the form of increased taxes imposed upon those who advocate the proscribed doctrine. There is not even a suggestion that there is a danger to the tax structure from the disapproved advocacy or

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<sup>6</sup>This is not to say that the Meiklejohn absolutist position (see Justice Frankfurter, concurring, in *Dennis v. United States*, 341 U. S. 494, 525, n. 5) must necessarily be placed in limbo. But since in these cases the interest in protecting free speech so far outweighs any interest which can be cited in support of suppressing it, the "weighing of competing interests" approach will sustain petitioners and call for reversal of the court below.

<sup>7</sup>Completely disregarded is the second phrase of the Article having to do with advocacy of support, etc.

<sup>8</sup>From the standpoint of constitutionality, the fact that the penalty imposed here is in the form of a tax rather than penal is of no significance. A state may not, in the form of a tax, suppress the exercise of free speech any more than it can suppress it in the form of making the speech a crime. (*Murdock v. Pennsylvania*, 319 U. S. 105, 116.) "(I)n passing upon constitutional questions the court has regard to substance and not to mere form." (*Near v. Minnesota*, 283 U. S. 697, 708.) Moreover the oath provision does contain serious felony penal sanctions. A fact which makes it even more vulnerable under the "vice of vagueness" argument heretofore made.



what the harm to the tax structure would be if the advocates were given the exemption.

In justifying the restriction on free speech as against the public policy of the tax structure, the majority below said [R.F. 41] that the censured advocacy was illegal under the Smith Act (54 Stat. part I, p. 670). But it is clear that the justices misunderstood; just as did the trial court in *Yates v. United States*, 354 U. S. 298, what this Court had said in *Dennis v. United States*, 341 U. S. 494. In quoting from the trial court's instruction which this Court upheld in *Dennis*, the majority below omitted that portion of it having to do with "incitement to action."

Thus the "advocacy of the overthrow of the government" phrase of Article XX comes to this Court with an authoritative state construction that mere abstract advocacy, short of incitement to action, is without constitutional free speech protection. That this construction is contrary to *Dennis* and *Yates* is clear.

The dissents made no such error.

Chief Justice Gibson and Justice Traynor said [R.F. 60]:

"The state provisions in question penalize advocacy in a totally different context from that in the *Dennis* case. The penalty falls indiscriminately on all manner of advocacy, *whether it be a call to action or mere theoretical prophecy* that leaves the way open for counter-advocacy by others. . . ." (Italics added.)

<sup>9</sup>The majority's view of the instruction was as follows [R.F. 53]:

" . . . if the defendants actively advocated governmental overthrow by force and violence as speedily as circumstances would permit, then as a matter of law . . . there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution. . . ."

And Justice Carter said [R.F. 83]:

"A reading of the majority opinion leaves in the minds of the reader the implication that the 'clear and present danger' rule was abrogated by the later case of *Dennis v. United States*, 341 U. S. 494 [71 S. Ct. 857, 95 L. Ed. 1137]. In the Dennis case it was specifically noted by the court that in the Smith Act 'Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction. Rather Congress was concerned with the very kind of activity in *which the evidence showed these petitioners engaged.*' It will be recalled that we have here no evidence that the churches and veterans involved were even so much as accused of the forbidden activities. . . . Where is the 'danger' so far as churches and veterans are concerned? And does the denial of a charitable exemption constitute a reasonable attempt to save this country from revolution? . . ." (Italics in original.)

The majority below also stated that another interest of the State which justified the infringement on free speech was that of [R.F. 51-52] "maintaining the loyalty of its people and thus safeguarding against its violent overthrow by internal or external forces." This is to be accomplished, the majority informs [*ibid*] "by placing in a favored economic position" those who do not so advocate.

Chief Justice Gibson and Justice Traynor answered this novel constitutional contention [R.F. 63]:

"The issue thus narrows to whether a state can properly restrain free speech in the interest of promoting what appears to be eminently right thinking. A state with such power becomes a monitor of thought to determine what is and what is not right thinking.

Great as a state's police power is, however, the United States Supreme Court has yet to sanction its breaking into people's minds to make them orderly. . . ."

With reference to the oath requirement of Section 32, the majority below simply says [R.F. 54]:

"Statutory limitations on the free exercise of speech similar in nature to the present limitation have been imposed as valid conditions upon which some privilege, benefit or conditional right has been withheld by a state. . . ."

and cites, in addition to state court rulings including California's, this Court's decisions in *Garner v. Board of Public Works*, 341 U. S. 716; *Adler v. Board of Education*, 342 U. S. 485; *Gerende v. Baltimore, etc., Board of Elections*, 341 U. S. 56, and *United States v. Schwimmer*, 279 U. S. 644.<sup>10</sup>

But none of the cases cited by the majority can justify the restraint of the oath here. Indeed, this Court's decision in *Wieman v. Updegraff*, 344 U. S. 183, in which is explained the meaning of *Garner*, *Adler* and *Gerende* demonstrates their inapplicability.<sup>11</sup> As explained in *Wieman*, the oath sustained in *Gerende* was "that the affiant was not engaged in an attempt to overthrow the government by force or violence" (344 U. S. 183, 189). The oath sus-

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<sup>10</sup>In citing the *Schwimmer* case, the majority below overlooked the fact that that case was expressly overruled by this Court in *Girouard v. United States*, 328 U. S. 61, 69.

<sup>11</sup>The *Adler* case was not an oath case at all. Disqualification for public employment there followed not from refusal to take an oath as to advocacy, but from unexplained *knowing membership* in an organization found by the Board of Regents, after *notice and hearing*, to advocate the overthrow of government by force and violence, and even then the membership was only *prima facie* evidence of disqualification. (Cf. *Konigsberg v. State Bar*, 353 U. S. 252.)

tained in *Garner* applied to a relatively few—city employees. The oath here applies to hundreds of thousands, if not millions (see p. 35, *infra*). In answering the majority's reliance upon *Adler*, *Gerende* and *Garner* (and also distinguishing *A. C. A. v. Doubs*, 339 U. S. 382) Chief Justice Gibson and Justice Traynor correctly held [R.F. 61-62] that the restraint on free speech here was not "in fact reasonably related to the attainment of the governmental object."

Moreover, none of the cases mentioned had to do with disavowal of support. This is a totally new concept in the modern loyalty oath development. If anything, the *Girouard* case (*supra*, note 10), teaches that the requirement of such an oath as a condition to obtaining, there citizenship, here tax exemption, is unavailing.

Furthermore, as so clearly pointed out by Chief Justice Gibson's and Justice Traynor's dissent below [R.F. 57]:

"A restraint on free speech is not less a restraint when it is imposed indirectly through withholding a privilege rather than directly through taxation, fine, or imprisonment . . . (citing inter alia, *Hannegan v. Esquire, Inc.*, 327 U. S. 146 and Mr. Justice Brandeis' dissent in *United States ex rel Milwaukee Social Democratic Publishing Co. v. Barleson*, 255 U. S. 407, 430-431 recalling *Cummings v. Missouri*, 4 Wall (US) 277, 325 to the effect that 'The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name.')

"If it is unconstitutional to restrain plaintiff from advocating overthrow of the government, it is *a fortiori* unconstitutional to require it to prove or declare that it does not advocate overthrow of the government. . . . Such a restraint is the more vicious because it penalizes not only those who advocate overthrow



of the government but also those who do not but will not declare that they do not. There are some who refuse to make the required declaration, not because they advocate overthrow of the government, but because they conscientiously believe that the state has no right to inquire into matters so intimately touching political belief. Rightly or wrongly they fear that such an inquiry is the first step in the censorship of ideas. Even in the face of a bona fide danger, the state has no power to embark on an unnecessary wholesale suppression of liberty (citing this Court in *Butler v. Michigan*, 352 U. S. 380)."

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"Section 32 impedes not only advocacy but discussion short of advocacy that may be of the utmost value. . . ."

"The majority opinion in the present case goes far beyond any United States Supreme Court decision in upholding legislation that restricts the citizen's right to speak freely. . . . The provisions infringe the right to engage in such advocacy without reference to its seriousness, inhibit free discussion short of advocacy, and penalize the belief that the government has no right to require professions of innocence in the absence of proof of guilt. A law with such consequences cannot stand in the face of the constitutional guarantees."

Additionally, the error of the majority below in construing the provisions to be applicable absent incitement to action, causes the provisions to run afoul the free speech guarantee just as did the statute in *Thornhill v. Alabama*, 310 U. S. 88. For this means that legal (no incitement to action), as well as illegal (incitement to action), advocacy is prohibited. The provisions, therefore, do not "aim

specifically at evils within the allowable area of State control but, on the contrary, sweep . . . within (their) ambit other activity that in ordinary circumstances constitute an exercise of freedom of speech or of the press." (*Thornhill v. Alabama*, 310 U. S. 88, 97.)

We would suppose it to be self-evident, if the investigative power of legislatures is subject to the free speech command of the 1st and 14th Amendments (*Sweezy v. New Hampshire*, 354 U. S. 234; *Watkins v. United States*, 354 U. S. 178), that so also is the taxing power. "The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws." (Opinion of Chief Justice Stone, dissenting in *Jones v. Opelika*, 316 U. S. 584, 609, expressly adopted in the second case after re-argument, *Jones v. Opelika*, 319 U. S. 103, 104.) In denying tax exemption unless advocacy is forsaken or disavowal of advocacy not declared, California has unconstitutionally taxed "the dissemination of views because they are unpopular, annoying or distasteful" in the same manner as did the ordinance struck down by this Court in *Murdock v. Pennsylvania*, 319 U. S. 105, 116.

**C. The Oath Violates the Freedom of Religion Guarantee; It Seriously Breaches the Wall of Separation Between Church and State.**

The court below found no reason for concern in that part of the oath and state constitutional provision which required the church to give up its right of moral judgment, on pain of loss of tax exemption, to criticize "the United States" in the event of hostilities. We have previously pointed out (note 10, *supra*, page 16) that the majority below's reliance upon *United States v. Schwimmer*, 279 U. S. 644, is misplaced because of its having

been overruled by this Court in *Girouard v. United States*, 328 U. S. 61, 69.

We need not labor the point that an important role of the Church is to criticize, by advocacy if you will, actions of the Government. In Justice Carter's dissent below, it was pointed out [R.F. 87] that "(t)he heritage of Thomas Jefferson—'Rebellion to Tyrants is obedience to God'—remains with us, embodied in our institutions and traditions." If this be so, we submit, then the requirement that the Church abjure in advance, on pain of loss of tax exemption, its role in this regard is indeed an interference with Freedom of Religion and a breach of the wall of separation between Church and State.

Petitioners recognize, of course, that merely stating the proposition that these cases involve the problem of the separation of Church and State does not furnish the solution. "This is so because the meaning of a spacious conception like that of the separation of Church from State is unfolded as appeal is made to the principle from case to case." (*McCullum v. Board of Education*, 33 U. S. 203, 212, concurring opinion; cf., *Everson v. Board of Education*, 330 U. S. 1; *Zorach v. Clauson*, 343 U. S. 306.) The appeal to the principle here, however, does call for the application of the watchword, ceaseless vigilance, "to prevent (its) erosion by . . . the State." (*Roth v. United States*, 354 U. S. 476, 488.) We think this is a clear case where the wall has been breached. It is a case where religion has not been preserved from censorship and coercion; the coercion by the state has not even been subtly exercised (*McCullum v. Board of Education*, *supra*, at 217). It is a case involving matters of the spirit, in which "inroads on legitimacy must be resisted at their incipency" because "this kind of evil grows by what it is

allowed to feed on.” (*Sweezy v. New Hampshire*, 354 U. S. 234, 263, concurring opinion.)<sup>12</sup>

The Court below sustained the validity of the oath against the freedom of religion attack on the ground that [R.F. 50] “this oath is ‘obviously not a test of religious opinion.’” This the court gathered because [R.F. 49] “the advocacy of the conduct prohibited has been made criminal by Congress.”<sup>13</sup> In so doing the majority below has failed to grasp the true meaning of the freedom of religion guarantee.<sup>14</sup> and has failed to note that one of the very reasons for the insertion of the clause in the Constitution was because the Founding Fathers were familiar with the coercion which had been theretofore practiced by the State in requiring acquiescence and the bended knee from the Church.<sup>15</sup>

Mr. Justice Carter’s dissent below [R.F. 73-77] answers, we submit, the majority’s argument.

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<sup>12</sup>Cf. the attempts made in the 1955 and 1957 California Legislature (*e. g.* S. B. 2003, Calif. Leg. 1955) to empower the State Attorney General to investigate church corporations and to remove any officer, trustee or director found by him to be affiliated, a sponsor of, officer, or member of, any organization found by the Attorney General of the United States to be communist or subversive. (*See Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94.)

<sup>13</sup>We have pointed out above, p. 14, the court’s error in this regard.

<sup>14</sup>It also failed to take cognizance of the second phrase of the oath regarding advocacy of support, etc.

<sup>15</sup>“It (the Flag salute) requires the individual to communicate by word and sign his acceptance of the political ideas it (the Flag) thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.” (*West Va. Bd. of Ed. v. Barnette*, 319 U. S. 624, 633) citing William Tell’s sentence because he refused to salute a bailiff’s hat (21 Encycl. Britannica, 14th ed., 911, 912) and William Penn’s suffering punishment rather than uncover his head in deference to any civil authority (Braithwait, *The Beginnings of Quakerism* (1912) 200, 228, 230, 232, 233, 447, 451; Fox, *Quakers Courageous* (1941) 113).

The theory of the majority below seems to be that the provisions here involved cannot impinge on the freedom of religion guarantee because [R.F. 48], "The plaintiff is affected not because it is a religious organization but because it is a taxpayer favored in the law by an exemption for which it has refused to qualify. The plaintiff has failed to point out what tenet or doctrine of its faith is infringed upon by compelling it to qualify for the exemption." In its insistence on a "tenet or doctrine or faith," the majority below overlooked the fact (and the demurrer admits same as being the fact) that petitioner's "principles, moral and religious" "as a matter of deepest conscience, belief and conviction" deny "power in the state to compel acceptance by it or any other church of this or any other oath of coerced affirmation as to church doctrine, advocacy or beliefs" [R.F. 14, 23]. That this is religious faith of the very kind which led to the separation of church and state is, we should think, unquestioned. That the majority below did not conceive this as being a religious tenet or doctrine is surprising because if the First Amendment means anything at all, it means that Courts cannot sit in judgment on the verity of religious faith. "The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state." (*United States v. Ballard*, 322 U. S. 78, 87.)

True, the fact petitioners maintain it is a religious tenet that the State cannot require them to affirm as to their non-advocacy, does not dispose of the question (*Reynolds v. United States*, 98 U. S. 145; *Cleveland v. United States*,



392 U. S. 14; *Prince v. Massachusetts*, 321 U. S. 158). But that it is a religious tenet cannot be gainsaid. These cases, as well as *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94, teach that it is only acts, not doctrine, that can be punished by the state.

We turn then to the majority's argument [R.F. 48] that petitioners are affected not because they are religious organizations but because they are taxpayers. Implicit in the majority's reasoning is the same error into which this Court first fell in *Minersville School District v. Gobitis*, 310 U. S. 586, wherein, regardless of religious belief, school children were required to bend to political orthodoxy by saluting the Flag, on pain of expulsion from school. Overruling *Gobitis*, this Court said in *West Virginia Board of Education v. Barnette*, 319 U. S. 624, 642):

"If there is one fixed star in our Constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein.* . . ." (Italics added.)

But it is precisely this which the oath here requires.<sup>16</sup>

Justice Carter in his dissent below [R.F. 73-77] has shown how the use of the *oath ex-officio* though often

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<sup>16</sup>We do not dwell on the "depressing" fact "that the oath has always cropped up as a political device when the political order was crumbling. (Justice Carter, dissenting below [R.F. 69], quoting from Professor Carl Joachim Friedrich's article, "Teacher's Oaths," 172 *Harpers* 171, Jan. 1936.) Nor are we unmindful that oaths "are the first weapons young oppression learns to handle; weapons the more odious since, though barbed and poisoned, neither strength nor courage is necessary to wield them." (Sen James A. Bayard of Delaware, in an address to the Senate, January 16, 1864 (34 *Cong. Globe*, Part 1, 342).)

couched in religious terms was really a political weapon,<sup>17</sup> and how the freedom effected from religious repression contributed to and went hand in hand with the freedom effected from political repression. The oath in question here designed, in the view of the majority below [R.F. 51] to maintain the loyalty of the people, though couched in political terms, is religious in its effect on the church, for it forces the church to acknowledge that the state has the power to compel the church to confess its advocacy.<sup>18</sup>

As noted, the majority below said [R.F. 49, 50] that because the advocacy condemned by the oath has been made illegal by the Smith Act, petitioner cannot complain of the contents of the oath since it is "obviously not a test of religious opinion." The fact, aside, that the majority

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<sup>17</sup>In his address in the House of Commons on the repeal of the Test and Corporations Acts, Feb. 26, 1828, Mr. Ferguson said: "(The Test Act) was leveled against the Catholics, not as a religious, but a political sect, at the head of which was the Duke of York and even the King himself." (18 Hansard, Parliamentary Debates, 2nd Series (1828) 718.)

To James I, the Puritan movement represented the hated doctrine of the separation of church and state. "The official view then prevalent [was] that church and state were one society in a twofold aspect and to assail the former inevitably involved the latter." (Davies, *The Early Stuarts*, in 9 *Oxford History of England* (1937) 66.) "(T)he real difficulties with the Puritans stemmed from the fact that they were . . . ever discontented with the present government and impatient to suffer any superiority." (Schaar, *Loyalty in America*, Univ. of Calif. Press, 1957, page 65, quoting from Perry, *Puritanism and Democracy*, Vanguard Press, 1944, page 69.)

<sup>18</sup>In suggesting that the oath affects petitioners here not because they are churches but because they may be taxpayers, the majority below overlooked the fact that a statute may be valid under one set of facts and invalid under another (*Kansas City Southern R. Co. v. Anderson*, 233 U. S. 325, 329-330) and that it may be valid as to one class of persons and invalid as to others (*N. Y. ex rel Hatch v. Reardon*, 204 U. S. 152, 160-161). It is as churches that petitioners are affected here, a fact which cannot be overlooked and in the light of which the oath must be judged.

erroneously interpreted the Smith Act,<sup>19</sup> and the additional fact, also aside, that the majority overlooked the second phrase of the oath having to do with support of a foreign government, etc.,<sup>20</sup> the majority's reasoning misses the mark. The oath which the State here seeks to coerce the Church into taking has to do with what the Church advocates, or rather, what the Church does not advocate. While the majority describes [R.F. 47] this advocacy as action, no matter how named, it is advocacy nevertheless. And that is the pith of the question. If the principle of the wall of separation of Church from State means anything at all, it must mean that the State has no power to coerce the Church into *stating* that which it does not advocate, any more than it can compel the Church to *state* that which it does advocate. This is the point. (*West Virginia Board of Education v. Barnette*, 319 U. S. 624, 642; *Everson v. Board of Education*, 330 U. S. 1, 15.)

The use of the oath to compel political conformity and its effect on the Founding Fathers in relation to the adoption of the First Amendment is well known to this Court.<sup>21</sup> Justice Carter, in his dissent below also tells the story [R.F. 73-77]. We mention here a few examples of oaths, some strikingly similar to that here, all of which played their role in what eventually emerged as the principle of the separation of Church and State.

Sir Thomas More refused to take an oath recognizing that Henry VIII's marriage to Catherine had been invalid *ab initio*. For his reluctance he was convicted and exe-

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<sup>19</sup>As demonstrated by *Yates v. United States*, 354 U. S. 298.

<sup>20</sup>As to which the Smith Act has nothing to do.

<sup>21</sup>Cf., *American Communications Association v. Douds*, 339 U. S. 382, 447 (dissent); *Everson v. Board of Education*, 330 U. S. 1, 9.

cuted for treason on the theory that he had thus denied the King's title as supreme head of the Church.<sup>22</sup>

In 1606, during the reign of James I, an act was passed<sup>23</sup> requiring a long oath avowing, *inter alia*, that James was the lawful king, declaring that the Pope could not depose him or authorize an invasion of his countries or discharge his subjects of the allegiance to him or permit them to bear arms or raise tumults or *commit violence against him*, swearing allegiance to the king, renouncing the proposition that an excommunicated ruler might be deposed or assassinated by his subjects. At first the oath could be administered to those over eighteen who had been indicted or convicted of recusancy, the failure to attend the Church of England, but by 1610 the oath was required of persons holding a wide variety of government positions.<sup>24</sup>

The Corporation Act of 1661<sup>25</sup> required all those holding or seeking office to declare under oath their belief in the *unlawfulness of taking arms against the king* as well as disclaiming any obligation under the Solemn League and Covenant (the Puritan's declaration against taking the sacrament according to the Anglican Church). In 1662, by the Act of Uniformity<sup>26</sup> each minister was required to

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<sup>22</sup>Fisher, *History of England From the Accession of Henry VII to the Death of Henry VIII* (1910), in 5 *Political History of England* 353. More is said to have written his daughter: "It was a very hard thing to compel me to say either precisely with it against my conscience to the loss of my soul, or precisely against it to the destruction of my body." (Smith, *A History of England* (1949) 222; Maguire, *Attack of the Common Lawyers on the Oath Ex Officio* as administered in the Ecclesiastical Courts in England, in *Essays in History and Political Theory in Honor of C. H. McIlwain* (1936), 211.)

<sup>23</sup>Jac. I. C. 4.

<sup>24</sup>Jac. I, c. 6. .

<sup>25</sup>13 Car. II, stat. 2; c. 1.

<sup>26</sup>14 Car. II, c. 4.

take the Corporation Act oaths. In 1665, by the Five Mile Act,<sup>27</sup> each minister so deposed (for refusal to take the oath) was required to state under oath that under any pretense it was unlawful *to take arms against the king* and to pledge that they would not attempt *any alteration in the government of church or state*. Refusal meant inability to come within five miles of a community in which they had previously preached.

The English, of course, were not alone in their call for oaths as a test of loyalty to the State.

"Polycarp of Smyrna was asked only 'to swear by the Good Fortune of Caesar.' Speratus Donata and the other Scillitan martyrs likewise were asked merely to swear by the genius of their lord, the emperor, and to pray for his safety." (32 Cal. L. Rev. 1, 2, Comment.)

When they would not, they were persecuted not because of their religion but because of their lack, so-called, of loyalty.

Suspected Christians were asked to offer incense to the Gods or the statues of deified emperors, not to compel religious thinking or worship, but

"to symbolize the unity and solidarity of an Empire which embraced so many people of different beliefs and different gods; its intention was political, to promote union and loyalty; . . ." (Bury, *A History of Free Thought*, pp. 43-44.)

Enough has been shown, we think, to demonstrate that, in the light of history and tradition, the requirement of the oath here does indeed impinge upon freedom of re-

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<sup>27</sup>17 Car. II, c. 2.



ligion and the separation of Church and State.<sup>28</sup> For if the state can exact today, as the price of tax exemption, an oath as to disavowal of advocacy, on the theory that thus is loyalty shown, tomorrow it can redefine the meaning of loyalty and demand that the Church affirm as to its curriculum and the contents of the sermon. If the instant oath be proper and if the State should deem a more detailed and stringent oath necessary, at what point will the Church be able to maintain that the wall of separation has been breached? It is not the content of the oath alone, but the coercion of Church by State, which truly penetrates the wall and establishes the Church as subject to the will of the State.

Historically, concepts of loyalty shift and change as the forces pulling and tugging within the State lose or gain strength.<sup>29</sup> The oath of loyalty imposed today by a free society might be thought by many to be unobjectionable. But what of tomorrow and the day after? Can the Church be forced to surrender its moral convictions to a State whose principles fluctuate with the social and economic winds? We think not. The State's inroad must, therefore, "be resisted at (its) incipency."

The court below erred further in failing to understand that even the content of the oath shatters the wall. Especially is this true of the second phrase which calls for disavowal of advocacy of support of a foreign government in the event of hostilities. In other words the church must now, on penalty of loss of tax exemption, forswear its

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<sup>28</sup>As Appendix B. hereto, we set out a more extensive analysis made by William B. Murrish, Esq. of the California Bar, showing the compelling parallel between the historic religious test oaths of 16th-18th Century England and the oath involved here today.

<sup>29</sup>Schaar, *Loyalty in America*, Univ. of Calif. Press, 1957, Chaps. 3, 4 and 5.

right of moral judgment in the indefinite future regardless of the issues involved.

It would be to disregard a wealth of history to sustain such a proposition. This Court has not done so. The story is dramatically told in the *Schwimmer*, *Macintosh*, *Bland*, *Girouard* and *Cohnstaedt* series of cases.<sup>30</sup>

The *Girouard* case, it will be remembered, overruled *Schwimmer*, *Macintosh* and *Bland* which had required, as the price of naturalization, that an alien forswear his conscientious scruples concerning war. The *Macintosh* case, perhaps, best illustrates the point because Professor Macintosh did not claim to be a pacifist. In answer to the question on the preliminary naturalization form, "If necessary, are you willing to take up arms in defense of this country?" he answered: "Yes, but I should want to be free to judge of the necessity" (283 U. S. at 617). By way of written statement Professor Macintosh said (283 U. S. at 618):

"I do not undertake to support 'my country, right or wrong' in any dispute which may arise, and I am not willing to promise before hand, and without knowing the cause for which my country may go to war, either that I will or that I will not take up arms in defense of this country, however 'necessary' the war may seem to be to the government of the day."

By way of oral testimony at the trial, as described by the court, he said (283 U. S. at 618, 619):

"he would have to believe that the war was morally justified before he would take up arms in it or give

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<sup>30</sup>*United States v. Schwimmer*, 279 U. S. 644; *United States v. Macintosh*, 283 U. S. 605; *United States v. Bland*, 283 U. S. 636; *Girouard v. United States*, 328 U. S. 61; *Cohnstaedt v. United States*, 339 U. S. 901.

it his moral support. He was ready to give the United States all the allegiance he ever had given or ever could give to any country, but he could not put allegiance to the government of any country before allegiance to the will of God. He did not anticipate engaging in any propaganda against the prosecution of a war which the government had already declared and which it considered justified; but he preferred not to make any absolute promise at the time of the hearing, because of his ignorance of all the circumstances which might affect his judgment with reference to such a war. . . . The position thus taken was the only one he could take consistently with his moral principles and with what he understood to be the moral principles of Christianity."

Macintosh was denied citizenship.

Mr. Chief Justice Hughes, in his historic dissent, later accepted by this court in *Girouard*, said (283 U. S. at 633), that while, undoubtedly, the State had the power to enforce obedience to laws regardless of scruples, nevertheless "in the forum of conscience, duty to a moral power higher than the state has always been maintained"; that "the essence of religion is belief in a relation to God involving duties superior to those arising from any human relation"; that there is abundant room for maintaining the supremacy of law as essential to orderly government "without demanding that . . . citizens . . . shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power."

In the *Girouard* case, this Court said (328 U. S. at 68):

"... The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual.

The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. . . ."

These cases involved admission to citizenship, a governmental interest, at least as weighty, we suggest, as the right to demand taxes. These cases involved aliens, a field in which, save for procedural due process, Congress' authority has been thought to be virtually unlimited (*cf.*, *Galvan v. Press*, 347 U. S. 522). Nevertheless this Court held that man's duty to God, his conscience in the making of moral judgments and in not promising beforehand to give up that right, need not knuckle under to the State.

The oath, as interpreted by the Government in the *Schwimmer* and following cases, was interpreted by this Court as a test oath. No less is the oath at bar. And this Court said in *Girouard* (328 U. S. at 69): "The test oath is abhorrent to our tradition." By its insistence on the oath here, the State, through the decision below, has demanded of the Church that which it may not, consistent with our traditions and the First Amendment. The insistence by respondents on the oath

"transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." (*West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 642.)

**D. The Provisions Violate Due Process Because They Are Arbitrary.**

The provisions in question violate Due Process because they are arbitrary abridgments of freedom of expression unwarranted by the evil they seek to correct. There is no showing, and indeed, no contention that churches have engaged, or that there is *any* danger that they might engage, either within or without constitutional limits, in advocacy of doctrine proscribed by the provisions. Indeed the Court below concedes the contrary to be true.<sup>31</sup> And neither the legislature nor the people have made findings of any such danger,<sup>32</sup> nor have counsel for respondents ever advanced the suggestion.<sup>33</sup> Moreover, twice since

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<sup>31</sup>Thus the majority below said [R.F. 56]: "It is inconceivable that an organization actuated by the doctrinal pronouncements there declared (principles and objectives of that petitioner attached to its Protest) would knowingly harbor within itself any person or group of persons who would engage in the subversive activities referred to in section 19 of Article XX. It is taken for granted that an organization actuated by those high purposes and ideals would be the first to champion the efforts of the state to protect itself against the destruction of those guarantees which are necessary to the existence of the plaintiff and to the preservation of the fundamental rights which it otherwise enjoys."

<sup>32</sup>Cf. Findings by the California legislature that there was a danger of subversion from teachers (Ed. Code, Sec. 12600) and from public employees (Gov. Code, Sec. 1027.5). These were passed by the same legislature that passed Section 32. They find that there is a clear and present danger that members of the world communism movement will infiltrate the teaching and government employment professions and indoctrinate students and impede the enforcement of law. No such findings were made as to churches nor any other of the tax exempted bodies.

<sup>33</sup>In the official argument submitted to the voters of California in 1952 when the constitutional provision was voted on, no suggestion was made that there was any danger from churches viz-a-viz the noted advocacy. Instead the whole argument was slanted at the punitive: "this will have the effect of hitting such persons or organizations in the pocketbook." See note 5, *supra*, p. 11, describing the pamphlet, lodged with this Court, containing the Arguments to Voters.



Section 32 was passed has the California legislature excused churches which failed to get their exemptions because they did not sign the oath.<sup>34</sup> True, the legislature still required the bended-knee in the form of the oath, but so anxious was the legislature that the churches immediately get their exemption that both times it made the legislation emergency measures rather than have them await the normal 90 days after adjournment.<sup>35</sup> It is to be noted that when Section 32 was added to the Revenue and Taxation Code (1953 Cal. Stats., ch. 1503, p. 3114), no urgency clause was attached. A further incongruity is present when it is noticed that under the ameliorating statute (Rev. & Tax. Code, Sec. 262) even though a church did wrongfully advocate in the past, it gets tax exemption even for that past if today it takes the oath. Justification for Article XX and Section 32 cannot, therefore, be claimed on the ground of danger.<sup>36a</sup>

While, perhaps, more clearly evident when stated in terms of denial of equal protection<sup>36</sup> (treated in the next section), the provisions, especially the oath, nevertheless

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<sup>34</sup>Calif. Stats. 1955, c. 6, p. 441; Calif. Stats. 1957, c. 4, p. 550. (Cal. Rev. and Tax. Code, Sec. 262.)

<sup>35</sup>We set out in Appendix C, the 1957 excusing legislation and a portion of the State Constitutional provision regarding urgency measures. The legislation declares that the failure of churches to obtain their tax exemption because they failed to sign the oath "substantially impair(s) their ability to function effectively."

<sup>36a</sup>Indeed the lack of danger to justify any of the program is seen from the fact that in addition to cancelling ~~past~~ church taxes, providing the oath was currently taken, the 1957 legislature did the same thing as to the hospital, orphanage, college and welfare exemptions. (Cal. Rev. & Tax. Code, Secs. 263, 264, 266, 268; Cal. Stats. 1957, c. 7, p. 553, c. 417, p. 1266; c. 2108, p. 3737, c. 2015, p. 3584) and even for ordinary corporate exemptions. (Cal. Rev. & Tax. Code, Secs. 26072.5; Cal. Stats. 1956, c. 11, p. 138, as amended stats. 1957, c. 21, 574.)

<sup>36</sup>Cf. *Bolling v. Sharpe*, 347 U. S. 497, 499: "(T)he concepts of equal protection and due process . . . are not mutually exclusive."

also violate due process in the substantive sense because the requirements of abandonment of advocacy and the declaration of non-advocacy are not reasonably related to the purpose for which church tax exemption is given.

"The test of validity in respect of due process of law is whether the means adopted is appropriate to the end." (*Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85, 90.) So viewed, it would seem clear that Article XX requiring relinquishment of advocacy or the oath requiring abjuration of advocacy have no relationship to the power of the state to raise revenue.<sup>37</sup> There is no basis for the non-exemption from taxes by a church which uses its property exclusively for religious worship (the *sin qua non* of the church exemption) because it will not take an oath as to non-advocacy and at the same time to give exemption to other worshippers simply because they take an oath.

Taxing statutes, state or federal, like any others, which are arbitrary must fall before the due process clause.<sup>38</sup> There is no more justification for the oath required in the case at bar than there was for the oath required by the "Gwinn Amendment" (66 Stat. 403; 67 Stat. 307; 42 U. S. C. 1411c) that occupants of low-cost public housing were not members of subversive organizations. The oath at bar, like the Gwinn Amendment oath, is arbitrary and offends due process.<sup>39</sup>

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<sup>37</sup>To say nothing of the lack of power in the State to regulate advocacy by a church or right thinking.

<sup>38</sup>*Air-Way Electric Appliance Corp. v. Day*, 266 U. S. 71; *Schlesinger v. Wisconsin*, 270 U. S. 230; *Heiner v. Donnan*, 285 U. S. 312; *Hoeper v. Tax Commission*, 284 U. S. 26.

<sup>39</sup>*Lawson v. Housing Authority of Milwaukee*, 70 N. W. 2d 605, 270 Wisc. 269, cert. den. 350 U. S. 882; *Rudder v. United States*, 226 F. 2d 51 (C. A. D. C., 1955); *Kutcher v. Housing Authority of City of Newark*, 119 A. 2d 1, 20 N. J. 181; *Chicago Housing Authority v. Blackman*, 122 N. E. 2d 522, 4 Ill. 2d 319.

In sustaining the affidavit in *American Communications Association v. Douds*, 339 U. S. 382, this Court balanced the damage to the national economy from interstate political strikes against the restriction on the few affected by the affidavit requirement, and found the former to be of such weight as to justify the latter. The Court said (339 U. S. at 404):

“... (I)t (the Taft-Hartley affidavit) leaves *those few* who are affected free to maintain their affiliations and beliefs subject only to possible loss of positions which Congress *has concluded are being abused to the injury of the public* by members of the described groups.” (Italics added.)

No such few members, nor abuse, nor injury can be cited to justify the restraint here. Not just a few, but millions of persons in California—every householder, every farmer, every payer of income taxes, every church, every veteran, every charity—are affected.

California's Revenue and Taxation Code, its Agriculture Code, its Government Code and its Constitution list at least 25 (probably more) types of property which are exempt from taxation. One of them (Const., Art. 13, Sec. 10½) provides for an exemption for *every householder in the state*. The Statistical Abstract of the United States for 1956, page 49, lists California as having 3,336,391 households in 1950. The Abstract shows (p. 371) that in 1952, 4,598,000 income tax returns were filed by Californians. (Cal. Rev. & Tax. Code, Sec. 17181, provides a personal income tax exemption for every taxpayer and dependent in the State.) The Abstract further shows (p. 628) that in 1954 there were 123,000 farms in the state. (Art. 13, Sec. 1 of the Cal. Const. exempts from taxation all growing crops in the State.) The Annual Report of the Los Angeles County Tax Assessor for 1955-

1956, lists (p. 8) as the number of veterans who filed claims for exemption in the county in 1956, as 501,000. In other words, the provisions are all pervasive and rest their pall on every individual in the state.

And all this without even a suggestion of danger or harm. "Surely this is to burn the house to roast the pig" (*Butler v. Michigan*, 352 U. S. 380, 383). As Justice Carter said below [R.F. 88], "The issue is momentous, of far reaching implication, and the ruling of the court will be a categorical imperative whose cumulative effect will be seen only in the fullness of time." This Court should cut that time short.

The State's intrusion of its political power into this activity cannot be said to be "for reasons that are exigent and obviously compelling." (Mr. Justice Frankfurter, concurring, in *Sweezy v. New Hampshire*, 354 U. S. at 262.)

And due process has been offended on even another score. As seen, the Court below construed the advocacy of the overthrow of the government by force and violence phrase as not requiring incitement to action. Accordingly, Article XX and Section 32 apply to both lawful (absence of incitement to action), as well as to unlawful (incitement to action); advocacy. Surely this is "indiscriminate classification of innocent with knowing activity." (*Wieman v. Updegraff*, 344 U. S. 183, 191.) Like the oath in that case, the provisions "must fall as an assertion of arbitrary power" (*ibid.*). Like the oath in *Wieman*, the provisions here offend due process.

Additionally, the oath required by Section 32 violates due process because it creates a conclusive presumption that everyone who refuses to sign the oath advocates the overthrow of the government by force and violence or other unlawful means or advocates the support of a for-

eign government against the United States in the event of hostilities, or both. This is so because the only ground for denial of tax exemption is the proscribed advocacy. Yet any other reason for not signing is, under the statute, immaterial. Even if the claimant were given an opportunity to be heard—which he is not—and proved that he did not so advocate, the statute prevents the exemption because the declaration has not been signed.

Even a rebuttable presumption, to be constitutionally sustained, must have a rational connection between the fact proved and the ultimate fact presumed. If the inference of one from the proof of the other is not predicated upon human experience, the presumption is arbitrary. (*United States v. Tot*, 319 U. S. 463; *Morrison v. California*, 291 U. S. 82.) So much more, therefore, must a conclusive presumption be so grounded. It is well within the bounds of ordinary human experience that many persons and organizations (petitioners here are examples) have personal, moral or religious convictions against signing confessions of advocacy or beliefs. Such persons are not the slightest bit interested in overthrowing the government, or in supporting foreign governments, or in advocating either of these subjects.

It, therefore, just cannot be concluded, as a matter of common human experience, that all persons who refuse to sign the oath that they do not advocate, do so because they do advocate. Section 32, accordingly, is as arbitrary, and therefore as unconstitutional as was the charter provision struck down in *Slochower v. Board of Higher Education*, 350 U. S. 551, for here, as there, "The questions asked [the oath required] are taken as confessed and made the basis of discharge [denial of tax exemption]." (Paraphrased from *Slochower* at p. 558.)



**E. The Provisions Violate the Equal Protection Clause.**

In his dissent, Justice Carter said [R.F. 79] that when the evil to be avoided is considered, there is here no reasonable classification; that there is no evidence that any church has advocated, or intended to advocate, the forbidden philosophy. He described the provisions as a shotgun attempt to hit an undefined object. Commenting on the majority's thesis that the reason for the oath is to protect state revenues from impairment by those who would destroy it by unlawful means, he correctly points out that the majority does not make clear why it is that charitable institutions are singled out as presenting the greatest danger to this country in peace and war. He suggests that, on the contrary, churches would seem to be the least likely subjects of classification for legislative measures to correct the evil thought to exist.

And then, after quoting from this Court's decision in *Louisville Gas & E. Co. v. Coleman*, 277 U. S. 32, 37, to the effect that "mere difference is not enough," the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis," Justice Carter said [R.F. 82]:

"There is in my mind no doubt whatsoever that the legislation with which we are here concerned bears no relation whatsoever to the objective to be achieved. . . . The tax itself is on property owned by churches and used for religious purposes and the exemption applies only when such property is used for such purposes. . . . Property taxes and unpopular beliefs or advocacy would appear to be as far apart as the poles and to bear no reasonable relationship one to the other. The classification here involved falls directly

within the rule of the Louisville Gas case: it is arbitrary, it does not rest upon a difference bearing a reasonable and just relation to the act in respect to which the classification is proposed; it is a *mere* difference which 'is not enough.'"

It cannot be maintained that Article XX is an exemption provision. Quite the contrary: it is a taxing provision, for it levies a tax on property not previously subject to tax; by its terms it has no application to property which was taxable. Accordingly, it is a tax (albeit, also a penalty) and, as a tax is, as the *Louisville* case holds, subject to the limitations of the equal protection clause.<sup>40</sup>

In discussing this question it becomes necessary to ascertain what it is that is being taxed. In the cases at bar it is real property—real property that is used solely and exclusively for religious worship. The vice, then, of Article

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<sup>40</sup>*Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389 (1929) (holding unconstitutional a state statute imposing a gross receipts tax upon corporations engaged in the taxi business and excluding from tax natural persons engaged in the same business); *Concordia Fire Ins. Co. v. Illinois*, 292 U. S. 535 (1934) (state statute imposing tax on net receipts of foreign fire insurance corporations could not constitutionally be applied to receipts of such corporations from casualty insurance because no similar tax was levied on the receipts of foreign casualty insurance corporations); *Southern Railway Co. v. Greene*, 216 U. S. 400 (1909) (statute imposing higher franchise tax on railroads owned by foreign corporations than on railroads owned by domestic corporations held unconstitutional); *Smith v. Cahoon*, 283 U. S. 553 (1930) (state statute requiring carriers transporting goods for hire to furnish bond or insurance policy, but excepting carriers transporting agricultural, horticultural, dairy, or fish from its operation held unconstitutional); *Air-Way Electric Appliance Corp. v. Day*, 266 U. S. 71 (1924) (holding statute measuring franchise tax by ratio based upon shares of authorized common stock and the value of property owned and used within the state held unconstitutional because the measure of the tax had no reasonable relation to the value of the franchise); *Hanover Fire Ins. Co. v. Carr*, 272 U. S. 494 (it is violative of the equal protection clause to tax foreign corporation on net receipts but not to so tax domestic corporations).

XX, as well as Section 32 becomes quickly apparent, for the discrimination<sup>41</sup> that is effected by them depends not upon the nature of the property, its value, extent, location use nor any other factor relating to the property, but rather upon unrelated, non-advocacy of the owners. Under Article XX, the same, identical property put to the same, identical use is taxable or non-taxable depending upon whether its owner advocates; while under Section 32, the same, identical property put to the same identical use becomes taxable or non-taxable depending not even on whether the owner advocates but on whether the owner will say that it does not advocate.

There need thus be no difference between property taxed and property not taxed. The lack of reasonable connection for the tax and the unreasonableness thereof becomes the more apparent when it is realized that in California payment of a tax such as this—which is on the property and not on the owner—can only be enforced by sale of the property, not against the owner (*McPike v. Heaton*, 131 Cal. 109, 63 Pac. 179).

Moreover, the lack of reasonable classification is further demonstrated when it is considered that in truth the oath could not under any circumstances achieve its claimed objectives. Though it purports to cover all churches (and other charitable organizations), in reality it is imposed only on churches whose conscience is not offended and on churches whose poverty compels them to sacrifice conscience rather than close their doors. Thus the determining factor may well be the wealth of the particular church.

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<sup>41</sup>"Discrimination of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the Constitutional provision." (*Louisville Gas & E. Co. v. Coleman*, 277 U. S. 32, 37.)

In effect, the State has put the privilege of being "subversive" on sale.

The classification, accordingly, is not reasonable, it is arbitrary and does not rest upon any ground of difference having a fair and substantial relation to the object of the legislation. Both Article XX and Section 32 deny equal protection.

## II.

### The Provisions Violate the Supremacy Clause.

It is to be noted that the advocacy, and the oath as to advocacy, condemned by the second portion of the provisions here in question<sup>42</sup> have nothing to do with the State of California. The provisions are an out-and-out bald attempt by the State of California to control the utterances of Californians in the field not merely of national problems, but actually in the field of international relations, and particularly in time of war which, of all matters, is peculiarly of federal concern.

Even aside from the statutory scheme in the field of sedition to which this Court made reference in *Pennsylvania v. Nelson*, 350 U. S. 497, we believe that a state's effort to impose penalties and restrictions upon what citizens might or might not say on the subject of the nation's relations to a foreign government can scarcely avoid running afoul the Supremacy Clause.<sup>43</sup> Compare *United*

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<sup>42</sup>"advocate(s) the support of a foreign government against the United States in (the) event of hostilities".

<sup>43</sup>We do not here go into a discussion of the legislation which Congress has enacted in the field, save to note that it is not without significance that in none of this legislation (see, e.g. 22 U. S. C. 611-621 (Chap. 115 entitled, Treason, Sedition and Subversive Activities)) has Congress seen fit to proscribe peacetime advocacy of support of a foreign government against the United States in the

*States v. Belmont*, 301 U. S. 324; *United States v. Pink*, 315 U. S. 203; *Hines v. Davidowitz*, 312 U. S. 352.

In *Pennsylvania v. Nelson*, *supra*, this Court found the state statute bad for three reasons: (1) because the congressional plan in the field of sedition made it reasonable to determine that no room has been left for state supplementation, (2) because the federal statute touches a field in which the federal interest is so dominant as to preclude state enforcement on the same subject, and (3) because enforcement of state acts present a serious danger of conflict in the administration of the federal program.<sup>44</sup>

We submit that the provisions at bar are subject to all three of the defects found in *Nelson*.

The facile answer given by the majority below<sup>45</sup> does not, we submit, suffice. It is axiomatic that a state cannot do indirectly what it cannot do directly (*Barrows v. Jackson*, 346 U. S. 249, 254). If the state cannot punish the

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event of hostilities. The advocacy prohibited (*e.g.* 18 U. S. C. 2385) is as to overthrow of this government, not support of another—two quite different things as even the provisions questioned in these cases show on their face. The "support of a foreign government" phase of the provisions here involved bears a melancholy resemblance to the Sedition Act of 1798 (1 Stat. 596: "aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government.") That repealed legislation may well have been the model for the current California provision.

<sup>44</sup>Thus the holding of the court below, that the advocacy condemned here is illegal despite the absence of incitement to action, is directly contrary to this Court's ruling as to the Smith Act in *Yates v. United States*, 354 U. S. 298.

<sup>45</sup>[R.F. 55-56]: "Furthermore, in any consideration of the possible application of the *Nelson* case to the case at bar, it would be unreasonable to conclude that the federal government intends to or has occupied the field of state taxation."



disapproved advocacy by the exercise of the criminal power, it cannot punish such advocacy by the exercise of the taxing power (*cf.*, *McCulloch v. Maryland*, 4 Wheat (U. S.) 316, 431, 4 L. Ed. 579, 607).

**Conclusion.**

The decisions below should be reversed.

Respectfully submitted,

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## APPENDIX A.

### Constitutional Provisions and Statutes Which the Case Involves.

California Revenue and Taxation Code, Section 32  
(Calif. Stats. 1953, c. 1503, p. 3114; §1):

"Any statement, return, or other document in which is claimed any exemption, other than the householder's exemption, from any property tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State shall contain a declaration that the person or organization making the statement, return, or other document does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities. If any such statement, return, or other document does not contain such declaration, the person or organization making such statement, return, or other document shall not receive any exemption from the tax to which the statement, return or other document pertains. Any person or organization who makes such declaration knowing it to be false is guilty of a felony. This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution."

California Constitution, Article XX, Section 19(b)  
[added November 4, 1952]:

"Notwithstanding any other provision of this Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other

unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:

“(b) Receive any exemption from any tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State.

“The Legislature shall enact such laws as may be necessary to enforce the provisions of this section.”

First Amendment to the United States Constitution:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Section 1 of the 14th Amendment to the United States Constitution:

“ . . . (N)or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Article VI, Clause 2 of the United States Constitution:

“This constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made or which shall be made, under authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.”

California Constitution, Article XIII, Section 1½:

"All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said building, when the same are used solely and exclusively for religious worship, or, in the case of a building in the course of erection, the same is intended to be used solely and exclusively for religious worship, shall be free from taxation; provided, that no building so used, or if in the course of erection, intended to be so used which may be rented for religious purposes and rent received by the owner therefor, shall be exempt from taxation."<sup>1</sup>

---

<sup>1</sup>Subsequent to the assessments here involved, this section was twice amended in manners not material to these cases. Basically the section is the same today, some additional exemption having been given. The section as above quoted is how it read at the time of the assessments and the denial of the exemptions involved in these cases.

## APPENDIX B.

### The Parallel Between the Religious Test Oaths of 16th to 18th Century England and the Oath Required by Section 32 of the California Revenue and Taxation Code.\*

The true nature and significance of the English history is not well appreciated in our day. Indeed the material is cumbersome in the extreme to unearth, correlate and develop to meaningful focus; there are hundreds of such Test Oath statutes, running from Volume IV of Statutes at Large through at least the following twenty succeeding volumes, and covering the reigns of Henry VIII, beginning in 1509, through at least George II, ending in 1760; and frequently a statute will incorporate either the oath or the penalties, or both, of one or more preceding oath statutes. But the import of the material is most valuable in disclosing the parallel between the religious test oaths of those days and the oath required by Section 32 of the California Revenue and Taxation Code.

#### 1. The Feature of "Advocacy of Force and Violence."

The California Oath applied to churches requires an oath that the church,

" . . . does not advocate the overthrow of the government of the United States or of the State of California by force or violence or other unlawful means or advocate the support of a foreign government against the United States in event of hostilities."

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\*An analysis prepared by William B. Murrish, Esq. of the California Bar.



Few even on the side of the government will quarrel that the First Amendment has barred test oaths. But government either assumes, or openly asserts, that the oath at bar, being essentially an oath directed at compelling disavowal of advocacy of force and violence, is not, even where applied to churches, a religious Test Oath, and is not of the character of the historic oaths of England's experience.

Yet this is basic—very basic—error. Lying at the very *core* of the classic English Test Oaths was this very feature and rationale—coerced disavowal, in a religious context, of *advocacy of or belief in force and violence against government*. Thus one of the classic Test Oaths was the "Jacobean Oath" of James I, imposed by 3 Jac. I, c. 4, 7 Stats, at Large 150, 155-6. In central part it consisted of disavowal on oath of any right or authority in the Pope or the Catholic Church to oppose the civil authority of the King, or to "give license or leave to bear arms, raise tumults, or to offer any violence or hurt to his Majesty's Royal Person, State, or Government." This oath is discussed in a significant review, "The Jacobean Oath of Allegiance and English Lay Catholics" in 28 Catholic Historical Review, 159-183, wherein unyielding Catholic refusal on principle to execute the oath—though the penalty, in ultimate, was death or praemunire—is treated. Catholics were at first divided as to consistency with religious conscience of taking the oath, but the division was resolved by a formal opinion of the Pope declaring Catholics could not lawfully take the oath because it contained "many things contrary to faith and salvation." (28 Cath. Hist. Rev. at p. 169.)

Disavowal of force and violence was also at the heart of the oath required under the famous Five Mile Act,

17 Car. II, c. 2, 8 Stats. at large, 217, 218. That Statute, which, forbade ministers violating its provisions from approaching nearer than five miles to any organized town, required an oath from all "parsons, vicars, curates, lecturers, and other person in holy orders, or pretended holy orders, and all stipendiaries and other persons who have been possessed of any ecclesiastical [sic] or spiritual promotion, and every of them," reading as below:

"I, A. B., do swear, That it is not lawful upon any pretense whatsoever to take arms against the King; and that I do abhor that traitorous position of taking arms by his authority against his person, or against those that are commissioned by him in pursuance of such commission; and that I will not at any time endeavor any alteration of government, either in church or state."

An identical oath was required under the famous Corporation Act of 1661, appearing in 13 Car. II, Stat. 2, c. 1, 8 Stats. at Large, 23, and by the Act of Uniformity of 1662, appearing in 14 Car. II, c. 4. The oath required by the Test Act of 1672, appearing in 25 Car. II, c. 2, was identical in content to the Jacobean Oath heretofore quoted in full.

It is very plain from such material as the foregoing—which could be many times multiplied—that the feature of coercing civil loyalty affirmations contrary to religious conscience, accompanied by compulsory disavowals of belief in or advocacy of force and violence against civil government, was a feature basic and native to the English Test Oaths, and was not a feature which might distinguish the instant oath from those historic subjects.

May's "Constitutional History of England," Volume II, at pages 173-174, comments aptly on the subject here as follows:

"By another act, no one could serve as a vestryman, unless he made a declaration against taking up arms and the covenant, and engaged to conform to the liturgy. . . . This, again, was succeeded by a new test, by which the clergy were required to swear that it was not lawful, on any pretense whatever, to take up arms against the King. This test, conceived in the spirit of the High Church, touched the consciences of . . . the Calvinistic clergy, many of whom refused to take it, and further swelled the ranks of dissent. While the foundations of the Church were narrowed by such laws as these, non-conformists were pursued by incessant persecutions. Eight thousand Protestants are said to have been imprisoned, besides great numbers of Catholics. Fifteen hundred Quakers were confined: of whom three hundred and fifty died in prison."

A second feature identifying the instant oath totally with historic English Test Oaths, and a feature paralleling the foregoing feature of denial of force and violence closely and being inter-related therewith very considerably, is the portion of the instant oath compelling and coercing denial of advocacy of support of a foreign power in event of inter-nation war. A feature present in each and every of the English oaths discussed above re force and violence, and a feature present as well in hundreds of others of the English Test Oaths, was a requirement that the oath-taker disavow and renounce advocacy of or belief in any right or authority in any religious agency or institution—including particularly, and usually by name, the Pope and the Holy See—to aid,

abet, instigate or give support to any foreign power in event of war or hostilities, and a requirement that the juror deny any belief or allegiance whatever to the contrary.

Thus the famous Jacobean Oath above described required an averral on this score that:

"I, A. B., do truly and sincerely acknowledge, profess, testify and declare on my conscience, before God and the world, that . . . the Pope, neither of himself, nor by any authority of the Church or See of Rome, or by any other means with any other, hath any power or authority . . . to dispose of any of His Majesty's Kingdoms or Dominions, or to authorize any Foreign Prince to invade or annoy him or his countries, or to discharge any of his subjects of their allegiance and obedience to His Majesty . . . etc. . . ."

—3 Jac. I, c. 4, 7 Stats. at  
Large, 150, 155.

Indeed, this feature was *central* to and dominant in a strong majority of all of the English oaths, and the above example could be multiplied from the statutes in Volumes 4 through 24 of Statutes at Large almost without end. The identity between the instant oath and the English classic test oaths in this respect is *very* complete and total. Indeed, many of the English oaths contain no content whatever beyond renunciation of the beliefs here treated, (i.e. belief that the Pope or any other religious agency might hold authority or right to influence or interfere in any respect with the exclusive support due, and the complete allegiance owed, by a subject to the King in the event of hostilities).

## 2. The Feature of Tax Disability as Connected to a Test Oath.

It has been urged that in any event the California oath is not parallel to the English Test Oaths because the California oath is not a condition laid upon the holding of civil office or emolument; but is solely a tax oath laid only upon the subject of a tax exemption, and having only a *tax* consequence. It is suggested this distinguishes it in full. Such is not the case. Because Test Oaths are mentioned as such in the Federal Constitution only in a clause (Art. VI, cl. 3) prohibiting their use as a condition of Federal civil employment, it is sometimes mistakenly suggested or conceived that religious test oaths refer only to oaths conditioning civil office or emolument. History is unanswerably to the contrary. Historically the English Test Oaths, though indeed often laid as conditions on civil offices, and particularly so in the best known Test Acts, as, for example, in the Corporation Act, were actually in their ultimate reach so inclusive in scope and so disastrous in burden and penalty (including perpetual imprisonment, praemunire, total property forfeiture, and even death) as to be conditions on *existence*, not upon civil office or emoluments alone. And particularly was this so as to *churches*, and church officers and ministers, as distinct from lay individuals only. An evident (and ultimately very naked) purpose of the oaths was to destroy, could such be done, all churches and institutions of religious opinion—and hence their leaders—which would not subordinate their doctrines and forms to civil control and dictate. Many of the test statutes, as for example the statute imposing the Jacobean Oath discussed above, fell not only on office seekers but on all persons whatever over the age of eighteen years. (See the



enlargement of the persons required to take that oath imposed by the subsequent statute, 7 Jac. I, c. 6, 7 Stats at Large 227, 228, discussed in 28 Cath. Hist. Rev. 159, 172.) Conversely, many of the statutes fell with particularly heavy hand and application upon ministers *as such*, as for example the Five Mile Act, 17 Car. II, c. 2, and the statute directed at the Quakers, entitled, "An Act for Preventing the Mischiefs and Dangers that may Arise by Certain Persons Called Quakers and Others, Refusing to Take Lawful Oaths," 13 and 14 Car. II, c. 1, which fell on Quakers as a religious grouping alone and by name (8 Statutes at Large 32.)

Moreover, on the direct subject at issue at bar, the imposing of a tax burden or discrimination based on refusal out of religious opinion and conscience to take a civil oath of supremacy, there is *exact* historical example in the Test Oath Statutes. The Statute in 9 George I, c. 18, appearing in 15 Statutes at Large 70, is entitled, "An Act for Granting An Aid to His Majesty by Laying a Tax upon Papists, and for Making Such Other Persons, as Upon Due Summons Shall Refuse to Neglect to Take the Oath Herethen Mentioned, to Contribute Towards the Said Tax . . .". That statute laid a special tax directly and without other cause or foundation upon all persons who prior to its enactment had refused, and who after its enactment should continue to refuse, to take the religious test oaths contained in a number of designated and interrelated prior Test Acts, including specifically 1 George I, Stat. 2, c. 55, 13 Statutes at Large 312, referring in turn to the statutes and oaths in 1 George I, Stat. 2, c. 13, 13 Statutes at Large 187, 189, and 30 Car. II, Stat. 2, c. 1, 8 Statutes at Large 427, 430, referring to and adopting the oath imposed in the Test Act

of 1672, in 25 Car. II, c. 2, which imposed a force and violence oath in the exact terms of the Jacobean Oath quoted in full earlier in this discussion. The rationale attempting to justify a special tax laid on oath-refusers in the statute discussed above, 9 George I, c. 18, was the very rationale urged in support of the California tax oath in the instant case, namely that persons declining to disavow advocacy or belief in force and violence represent burdensome tax expenses to the government to secure and maintain order and consequently should equitably bear a special tax burden. Thus in justification of the tax imposed in that statute it was recited therein that it had been taken as assumed that all oath-refusers of the prior test oaths "had all, or the greatest part of them, been concerned in stirring up and supporting the then late unnatural rebellion, by which they had brought a vast expense upon this nation, and that it manifestly appeared by their behavior, that they take themselves to be obliged, by the principles they profess, to be enemies to your Majesty and the present happy establishment, watching all opportunities of fomenting and stirring up new rebellions and disturbances within this Kingdom, and of inviting foreigners to invade it; and that it was highly reasonable that they should contribute a large share to all such extraordinary expenses, as were or should be brought upon this Kingdom by their treachery and instigation; and to the end that by paying largely to the great expenses which they had brought upon this nation, they might be deterred, if possible, from like offenses for the future, . . .". (9 George I, c. 18, 15 Statutes at Large 70.)

The debates in parliament on the passage of this statute are treated in Volume VIII, Cobett's, "Parliamentary History of England", pages 354-365 and again at pages

51-52. The rationale of justifying such a special tax upon oath-refusers (called "nonjurors"), and upon "Papists", was in unmistakable manner laid upon a presumption that these persons were connected with religious advocacy of force and violence. At page 354 the scrivener observes of the opening debate in Commons, as follows: "The Gentlemen, who have spoken in favor of this Bill have urged, that . . . the Roman Catholics have been more or less concerned in every conspiracy against the government; so that if they did not shew themselves in the late conspiracy, it was out of prudence, and not for want of zeal for the Pretenders' cause. They will not allow, that it is liable to the objection of not being supported with particular facts, but say, with great probability, that the Roman Catholics have made large contributions here at home, to send to the Pretender and his adherents abroad: and if they are in a capacity of supplying the necessities of their friends abroad, it is but very reasonable for them to contribute to the defraying of an expense that they have in a great measure, occasioned at home." Subsequently it is further observed: "Accordingly, after some debate, the Committee came to the following Resolution, viz. 'That towards raising the sum of 100,000 pounds granted to his Majesty, towards reimbursing to the public the great expenses occasioned by the late rebellions and disorders, to be raised and levied upon the real and personal estates of all Papists, an equal rate and proportion be raised and levied upon the real and personal estates of every other person, being of the age of eighteen years or upwards, *not having taken the oath of supremacy and allegiance, and the abjuration oath*, who shall upon due summons neglect or refuse to take the same.'" (Emphasis added.)

Additionally, all nonjurors, and recusants, and "papists", were by other statutes directly forfeited of two-thirds of all their real and personal property, and were incapacitated from either buying or inheriting land, unless they submitted to the test oaths, and on death their properties were forfeited by the Test Acts to their first of kin being a Protestant. (11 and 12 Will. III, c. 4; 1 George I, Stat. 2, c. 55, 13 Statutes at Large 312; II May's "Constitutional History of England", 176, f.n. 2.)

May comments as follows:

"It [Act of 11 and 12 Will. III, c. 4] incapacitated every Roman Catholic from inheriting or purchasing land; unless he abjured his religion upon oath; and on his refusal, invested his property, during his life, in his next of kin, being a Protestant . . . Again, in 1722, the estates of Roman Catholics and nonjurors were made to bear a special financial burden, not charged upon other property. [Referring to 9 George I, c. 18]."

—II May's, "Constitutional History of England", pp. 176-177.

Of course, tax and property burdens were not the sole measure of the penalties imposed. Coercive imprisonment, even perpetual, might accompany it; and sometimes banishment and abjuration of the realm was imposed. Speaking of the Jacobean Oath, it is noted in 28 Cath. Hist. Rev. 159, 180 that certain nonjurors under that Act were "condemned to perpetual imprisonment and [to] utter shipwreck of lands and goods for refusing this oath." And Quakers, under the statute previously cited, were subject on third offense for refusing test oaths to perpetual banishment, in addition to property forfeiture and imprisonment.

These are examples of the compelling historical material showing the applicability of the English test oath period to the California oath at bar. The material accords well with religious principle. It is directly controlling in Constitutional law and under our Bill of Rights since the Supreme Court has expressly and aptly observed that under the First Amendment, "The test oath is abhorrent" to our Constitution. (*Girouard v. United States*, 328 U. S. 61, 69.)

In addition to the materials mentioned above a valuable secondary treatment of test oaths appears in an article entitled, "Test Oaths: Henry VIII to the American Bar Association" in XI Lawyers Guild Review, pages 111-127. Further, a rare book with much contemporaneous material entitled, "A Summary of Penal Laws as to Nonjurors, Papists, Popish Recusants and Non-Conformists" collects most if not all of the statutes imposing Test Oaths during the period from the beginning of the reign of Elizabeth, in 1558, through the year 1716. This book makes particularly evident the overwhelming reach of the combined, interrelated terms of the hundreds of test statutes enacted, and the crushing scope of the combined penalties thereof, reaching to property, tax, jail, praemunire and even death.

It is true that the English oaths in many instances intruded directly into religious creed and sought to exert direct control over the form and content of creed and belief *in se*, as, e.g., by requiring denial of belief in transubstantiation (many examples) or compelling declaration of belief in "all and everything" contained in the Church of England Book of Common Prayer. (14 Car. II. c. 4.) Thus control of religious content directly and, in ultimate, totally, was the evident final purpose and objective of the English test oaths, above and beyond the



features discussed above as to renunciation of force and violence and renunciation of support of a foreign power in the event of war. But it is unmistakably evident and plain from English history that these latter features were not mere incidentals of the English test oath programs in history but were to the contrary central and even *emphasized* components thereof, and moreover, that it was largely upon a rationale rested directly upon those very features that the final end of compelling civil authority over direct creed and content was attempted and defended. Hence these characteristics were *basic* to the English oaths in every sense and manner of evaluation, and were blood and bone of the struggle for religious freedom engendered by exaction of the oaths; it cannot be doubted that rejection of the English Test Oaths by the First Amendment encompassed rejection equally of the dominant and central features of such oaths discussed herein.

## APPENDIX C.

### Excerpt From California Constitution, Article IV, Section 1.

California Senate Bill 202 (1957 Legislature; West's  
1957 California Legislative Service p. 5).

Article IV, section 1 of the California Constitution provides:

"No act passed by the Legislature shall go into effect until 90 days after the final adjournment of the session of the Legislature which passed such act, except . . . urgency measures necessary for the immediate preservation of the public peace, health or safety, passed by a two-thirds vote of all the members elected to each house."

The 1957 excusing legislation (see f.n. 35, p. 33, *supra*), which is identical with that passed in 1955 save the years 1955 and 1956 were added, reads as follows:

"An act to amend Section 262 of the Revenue and Taxation Code, relating to the church exemption, and declaring the urgency thereof, to take effect immediately.

(Approved by Governor January 31, 1957.

Filed with Secretary of State January 31, 1957)

*"The people of the State of California do enact as follows:*

"Section 1. Section 262 of the Revenue and Taxation Code is amended to read:

"262.

"Any tax or penalty or interest thereon for any fiscal year commencing during the calendar year 1952, 1953, 1954, 1955 or 1956 on property as to which

the church exemption was available for such fiscal year shall be canceled pursuant to Article 1 (commencing with Section 4986) of Chapter 4 of Part 9 of this division as if it had been levied or charged erroneously, and, if paid, a refund thereof shall be made pursuant to Article 1 (commencing with Section 5096) of Chapter 5 of Part 9 of this division as if it had been erroneously collected.

"No amount shall be canceled or refunded pursuant to this section unless the person or organization otherwise entitled to such cancellation or refund has first complied with the provisions of Section 32 of this code, relating to the loyalty declaration.

"Sec. 2. This act is an emergency measure necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

"Some churches have inadvertently failed to file the required affidavit in support of the tax exemption of their property which is granted by the State Constitution, and as a result now are confronted with obligations which, if met, *will substantially impair their ability to function effectively.* This act will remedy the situation by, in effect, removing the procedural bar to the application of the exemption to such property. In doing so, the public policy of the State as expressed in the Constitution will be entirely fulfilled and the State as a whole will benefit." (Italics added.)

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**JOHN T. FEY, Clerk**

**IN THE**

**Supreme Court of the United States**

**October Term, 1957**

**Nos. 382 and 385.**

**THE FIRST UNITARIAN CHURCH OF LOS ANGELES, a corpora-**  
**tion,**

*Petitioner,*

*vs.*

**COUNTY OF LOS ANGELES, CITY OF LOS ANGELES, H. L.**  
**BYRAM, County of Los Angeles Tax Collector, and JOHN R. QUINN,**  
**County of Los Angeles Assessor.**

**VALLEY UNITARIAN-UNIVERSALIST CHURCH, INC.**

*Petitioner,*

*vs.*

**COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF LOS AN-**  
**GELES, CALIFORNIA; H. L. BYRAM, County Tax Collector.**

**PETITIONERS' CONSOLIDATED REPLY**  
**BRIEF.**

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IN THE  
**Supreme Court of the United States**

October Term, 1957

Nos. 382 and 385.

THE FIRST UNITARIAN CHURCH OF LOS ANGELES, a corporation,  
*Petitioner,*

*vs.*

COUNTY OF LOS ANGELES, CITY OF LOS ANGELES, H. L. BYRAM, County of Los Angeles Tax Collector, and JOHN R. QUINN, County of Los Angeles Assessor.

VALLEY UNITARIAN-UNIVERSALIST CHURCH, INC.,  
*Petitioner,*

*vs.*

COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF LOS ANGELES, CALIFORNIA; H. L. BYRAM; County Tax Collector.

**PETITIONERS' CONSOLIDATED REPLY  
BRIEF.**

**I.**

**The Oath Violates Due Process and Equal Protection  
[Reply to Respondents' Points I, II and V(2)].**

**A. The Fact That Tax Exemption Is Involved Does Not  
Immunize the Statute From Constitutional Controls.**

This Court has never permitted the fact that "a gratuity or favor" (Resp. Br. 9) was being unconstitutionally taken away to deter it from declaring just that and to not permit it.

Justice Brandeis' dissent in *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407, 427 was approved by this court in *Hannegan v. Esquire*, 327 U. S. 146, 145:

"(G)rave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever."

In other words, albeit a privilege is involved, a state may not, consistent with the Constitution, take it away on grounds or by means that are arbitrary or unreasonable. This principle was admirably, and successfully, argued to this court (at pp. 7, 8, 74 of the reprint appearing in 25 ABA J1 7) in the *amicus curiae* brief filed by the Bill of Rights Committee of the American Bar Association in *Hague v. CIO*, 307 U. S. 496.<sup>1</sup>

And the principle has been more than once applied by this Court to strike down, as unconstitutional, State action which arbitrarily and unreasonably, as here, sought to deprive of a privilege.<sup>2</sup>

In *Wieman v. Updegraff*, 344 U. S. 183, 192, this Court said:

" . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

Compare concurring opinion in *Garner v. Board of Public Works*, 341 U. S. 716, 725:

"But it does not at all follow that because the Constitution does not guarantee a right to public employment, a city or a State may resort to any scheme for keeping people out of such employment. . . . To describe public employment as a privilege does not meet the problem."

And to the same effect is *Slochower v. Board of Higher Education*, 350 U. S. 551, 555:

" . . . To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities."

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<sup>1</sup>Signatories to the brief were Douglas Grant, Zechariah Chafee, Jr., Grenville Clark, Osmer C. Fitts, George I. Haight, Monte M. Lemann, John Francis Neylan and Joseph A. Padway.

<sup>2</sup>While technically church tax exemption may be described as being a privilege, it is certainly a strongly engrained and venerable one.



In the *Wieman* and *Slochower* cases this Court struck down, as arbitrary, state statutes calling for compulsory disclosure on pain of loss of job. And in *Garner*, the ordinance was sustained only by means of an assumption, not possible in the case at bar, of a non-arbitrary interpretation by the State courts.

Another recent example of where the fact that a state privilege was involved did not blind this Court to arbitrary conduct by the State is *Schwartz v. Board of Bar Examiners*, 353 U. S. 232. In that case the concurring opinion pointed out (353 U. S. at 248 and 249) that:

“ . . . Admission to practice in a State and before its courts necessarily belongs to that State . . .

“ . . .

“But . . . (r)efusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause

”<sup>2a</sup>

We submit that just as in *Schwartz*, “such is the case here” (*ibid.*).<sup>2b</sup>

<sup>2a</sup>On the Equal Protection phase of the instant case, touched on by respondents in their brief, pp. 9-12, the case of *F. S. Royster Guano Co. v. Virginia*, 253 U. S. 412, can be added to the cases cited by petitioners in note 40, pg. 39 of their opening brief as peculiarly in point because that case does indeed involve a state tax exemption. The refusal of the state to grant the exemption in that case, this court held, violated the equal protection clause of the 14th Amendment.

<sup>2b</sup>The *Schwartz*, as well as the *Konigsberg v. State Bar*, 353 U. S. 252, decisions of this Court demonstrate that even so “statey” a privilege as admission to practice law before state courts will not be permitted of abridgment under the guise of a state “privilege”. In this connection it should be pointed out that *In re Summers*, 325 U. S. 561, relied upon by respondents in their separate answer to the brief amicus curiae of the American Civil Liberties Union, was posited upon the decisions of this Court in *United States v. Schwimmer*, 279 U. S. 644 and *United States v. Macintosh*, 283 U. S. 605. Respondents fail to note that both the *Schwimmer* and *Macintosh* cases were expressly overruled in *Girouard v. United States*, 328 U. S. 61, 69 and that the dissents of Justice Holmes and Chief Justice Hughes represent the law today.

### B. The Oath Is Arbitrary and Unreasonable.

Respondents concede (Br. 4) that freedom of speech and of religion are infringed herein, but they argue that the interest of the state justifies the infringement. We submit the contrary.

What is the real purpose of the legislation here being examined that justifies the wholesale<sup>3</sup> requirement for the loyalty oath involved? The majority below tells us (R. F. 51, 52) that it is for the state to maintain "the loyalty of its people" and to thus safeguard "against its violent overthrow by internal or external forces." In other words it is an "endeavor (on the part of the State) to protect itself against subversive infiltration" (R. F. 52) or, put another way, it is a means hit upon by the State to protect itself against Communists.<sup>4</sup>

In the *Wieman* case the same laudable object was at hand, just as it was in *Slochower*.<sup>5</sup> But this Court found the interest not sufficient to overcome the Constitutional violations involved.

The question then becomes one of determining whether the evil at which the state has directed this incursion into freedom is sufficiently real and of sufficient magnitude to be allowed, or whether, in fact, it is but a "remote, shadowy threat to the security of California"

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<sup>3</sup>The 1957 Annual Report of the Los Angeles County Tax Assessor shows (pp. 19, 22, 69) that 539,659 claims for exemption were filed. Projected statewide (Los Angeles County has about 40% of the population of the state) this means that about 1,350,000 filed claims (were required to take the oath) in 1957. These figures do not include the number of corporations which were required to take the oath under Section 23705 of the Revenue and Taxation Code. Nor do they include the number of persons or organizations who did not file claims for exemption, though entitled thereto.

<sup>4</sup>If there be any doubt as to this latter, one need only look to the Arguments presented to the voters at the time Article XX was voted upon (these arguments have previously been lodged with the Clerk) where it was said (pg. 7): "There is no valid reason why such exemptions should be allowed communists and the like."

<sup>5</sup>The problem of balancing the state's interest in the loyalty of those in its service with the traditional safeguards of individual rights is a continuing one." (350 U. S. at 555.)

allegedly present in the doctrine that may be preached by churches. (*Sweezy v. New Hampshire*, 354 U. S. 234, 265, concurring opinion.)

It is submitted that the evil is not real, not present and that the whole program deals indeed with shadows, fantasy, fancy and chimera. It has never been suggested that in California there was any, or any danger of any, infiltration by Communists in the churches or other charitable organizations. The legislature made no such findings.<sup>6</sup> The arguments to the voters did not suggest that there was any such danger from California churches or any other exempt class. No judge in California who passed on the cases has suggested there was any such infiltration. The statements by the three dissenting justices below that there was no danger or infiltration was not challenged by the majority,<sup>7</sup> nor have respondents, nor do they now.<sup>8</sup>

Nor is there here the direct relationship that was present in other cases where this Court has upheld loyalty oaths.<sup>9</sup> The relationship between the state and church

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<sup>6</sup>And the California legislature has made findings of the danger of communist infiltration in other field, *e.g.* teaching (Ed. C. 12600) and public employment (Gov. C. 1027.5).

<sup>7</sup>Indeed the majority conceded the point (R. F. 56).

<sup>8</sup>Respondents' lame claim (Br. 24) that "advocacy was not to put in issue and under the pleadings there could be no showing that churches have engaged in advocacy," is a *non sequitur*. The constitutionality of Article XX as an infringement on free speech and freedom of religion was put in issue by the pleadings. In *ACA v. Douds*, 339 U. S. 382, the question, of whether the complainants were members of or were believers in, was also not put in issue, but the court made very clear that it was upholding the legislation because Congress was warranted in finding, and did find, that there was a danger from those at whom the statute was directed. Respondents can make no such claim here—nor do they.

<sup>9</sup>*E.g.* danger from interstate strikes (*ACA v. Douds*, 339 U. S. 382); fitness for employment where the employer has a right to know whether its employee is plotting its destruction (*Garner v. Board of Public Works*, 341 U. S. 716; *Adler v. Board of Education*, 342 U. S. 485).

advocacy is, even in theory, remote; in actuality it is non-existent.

It is noted that respondents do not support the court below (R. F. 52) in looking at the object of the legislation as intending to secure loyalty and to deal with subversives.<sup>9a</sup> Respondents uphold the legislation on the ground (Br. 4, 13, 37) that the exemption is granted in the first place for the public service<sup>9b</sup> the church will perform and that when a church advocates as proscribed by Article XX and Section 32, it no longer performs those functions and therefore the exemption may be taken away (Br. 13). But aside from the fact that all this is drawn out of thin air and whole cloth without any showing or contention that any church in California has or is likely not to function as it has in the past, respondents' argument completely misses the mark.

The exemption is denied not only to churches who *advocate*; it is also and, as it turns out, denied only to those who will not say because of sincere conscientious belief that the State has no right to require such confessions from the church.<sup>10</sup> An essential basis for the church in a democracy is that it be a free institution posited on conscience. It is precisely when it refuses to tell the state what it does or does not advocate that it is and is acting like a church. Therefore it is incorrect for respondents, and arbitrary for the State, to say that a church fails to render a public service when it stands up to the State. Were it otherwise, the Church would then simply be an organ of the political State, a concept which is abhorrent in this country.

But even if there were an evil or danger from churches in California, the means, the Oath, used to meet that

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<sup>9a</sup>Respondents state (Br. 65): "A church organization may be wholly disloyal and still qualify for exemption."

<sup>9b</sup>In their answer to the American Civil Liberties Union, respondents use the term "social benefit." (pg. 4).

<sup>10</sup>This is precisely the case here. Thus note that at Br. 39, respondents concede that "the proscribed advocacies as to overthrow of government and war support of the enemy certainly cannot be their (petitioner's) church doctrine or belief or religion."

evil is too sweeping and encompassing to meet constitutional demands.

It is to be remembered that it is as to churches and conscience with which we are dealing. To impose the pervasive dampener of the loyalty oath upon all churches and other charitable organizations is unwarranted.

In the concurring opinion in *Garner v. Board of Public Works*, 341 U. S. 716, 728, it was said of the oath there:

"The needs of security do not require such curbs on what may well be innocuous feelings and associations. Such curbs are indeed self-defeating. They are not merely unjustifiable restraints on individuals. They are not merely productive of an atmosphere of repression uncongenial to the spiritual vitality of a democratic society. The inhibitions which they engender are hostile to the best conditions for securing a high-minded and high-spirited public service."

Equally, or more, necessary is it that there not be the atmosphere of repression imposed by the State on the Church.

In *Kedroff v. Saint Nichols Cathedral*, 344 U. S. 94, 118, it was pointed out that in *American Communications Association v. Douds*, 339 U. S. 382, this Court permitted the intrusion on First Amendment rights, because of the "present excesses of direct, active conduct," but that that case did not stand for the proposition that the State could intrude in Church affairs, even as to the possession and use of a building "because of an apprehension, even though reasonable, that it may be employed for improper purposes." No more can the same be done here where there is "not even an apprehension."<sup>10a</sup>

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<sup>10a</sup> Respondents' statement (Answer to ACLU, pg. 8): "The power of a state to allocate its limited resources is fundamental to its existence. This heavily outweighs any infringement of free speech employed in advocacy of violent overthrow of the government or of war time support of a foreign government", speaks in a vacuum. Not only that; it speaks in the face of contrary fact. At the minimum, it would seem, the State should be required to assert, and show, that the danger at which the infringement is directed does exist. Otherwise, the mere assertion of power would justify the infringement. Such, we submit, is not the law.



In the concurring opinion in the *Kedroff* case, note was taken (344 U. S. at 123) of the fact that in the agreement between the Papal See and Mussolini. "The supremacy of the state was recognized by compelling bishops and archbishops to swear loyalty to the government." But in this country, there is no such theory. The opinion continued:

" . . . The fear, perhaps not wholly groundless, that the loyalty of its citizens might be diluted by their adherence to a church entangled in antagonistic political interests, reappears in history as the ground for interference by civil government with religious attachments. Such fear readily leads to persecution of religious beliefs deemed dangerous to ruling political authority. . . . The long, unedifying history of the contest between the secular state and the church is replete with instances of attempts by civil government to exert pressure upon religious authority. . . ."

The attempt by the state here is just that.

In the concurring opinion in *Wieman v. Updegraff*, 344 U. S. 183, 195, it was said:

" . . . (I)n view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amend-

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(*Yates v. United States*, 354 U. S. 298; *Slochower v. Board of Higher Education*, 350 U. S. 551; *Sweezy v. New Hampshire*, 354 U. S. 234.)

Respondents cavalier assertion (Answer to ACLU Br., pg. 8) that where there is a choice given the citizen to assert his constitutional right of free speech or to forego it, the First Amendment "is inherently less" infringed upon, is startling constitutional doctrine. No authority is cited for the proposition. Moreover, the statement is contrary to the facts of this case. It cannot be said that one has free choice when he must pay for the exercise of one's constitutional right. *Carter v. Carter Coal Co.*, 298 U. S. 238, 289.

ments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."

The opinion acknowledged that "solid threats to our kind of government . . . may be met by preventive measures before such threats reach fruition," (*ibid.*) but in considering the constitutionality of legislation such as this "it is necessary to keep steadfastly in mind what it is that is to be secured" (*ibid.* at 196). Teachers were described "as the priests of our democracy" (*ibid.*). In the case at bar, actual priests are here.

What is involved in this case is no less than an assault on the intellect. The plea made in the concurring opinion in *Sweezy v. New Hampshire*, 354 U. S. 234, 255, on behalf of teachers applies equally here on behalf of the Church. It was there said (354 U. S. at 261) that:

"When weighed against the grave harm from governmental intrusion into the intellectual life of a university . . . justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate."

Grossly inadequate, also, does the justification appear for compelling a church to discuss its advocacy.

Just as a free society depends on free universities, so also does it depend on free churches. "This means the exclusion of governmental intervention in the intellectual life of a (church). It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of (clergyman), qualities at once so fragile and so indispensable for fruitful (ecclesiastical) labor" (paraphrased from concurring opinion in *Sweezy v. New Hampshire*, 354 U. S. at 262).

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Thus viewing the case, and properly so, as we submit, the contention of respondents (Br. 19-21) that the oath requirement here is but an innocuous "evidentiary provision" is to fail to see the oppressive hand of the state in its true light. That the state is entitled to *facts* is not gain-said. But it is entitled only to facts, not to avowals as to opinions or advocacy. Proof of ownership, value, use, location, necessity to file a claim, are matters entirely different from what the state is demanding here. The pervasive pall cast by the oath here required and the damage done to the free spirit of the church thereby are prices too big to pay for any factual information the state may get. The subordinating interest of the state here is not so compelling as to make the church forego so basic a liberty as its autonomy.

The oath is arbitrary and unreasonable.

## II.

### **The Oath Violates the Principle of the Separation of Church and State [Reply to Respondents' Point V(1)].**

Respondents miss the point and they miss the lesson of the First Amendment when they posit this part of their case on the argument "that the proscribed advocacies are not religion." (Br. 38.) Whether the advocacies are or not is beside the point.<sup>11</sup> Even if change of government, by overthrow or otherwise are "secular and not matters of religion," (Resp. Br. 53) this does not mean that the

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<sup>11</sup>Although one certainly treads on treacherous ground when he seeks to get a court to define religion. (*United States v. Ballard*, 332 U. S. 78, 87; *Fowler v. Rhode Island*, 345 U. S. 67, 70.) The Mormon cases relied upon by respondents (Br. 39, 40) do not stand for the proposition that a state may require a Church to take an oath as to advocacy.

state has power to compel the Church to acknowledge its faith therein. (*West Virginia Board of Education v. Barnett*, 319 U. S. 624.) To hold otherwise is to ignore, as indeed respondents have done in their brief, the lesson of history (see Pet. Op. Br. pp. 25-27; Appendix B) which teaches that it is just such oaths as this here, even contents and tax disability wise, which led to the very adoption of the First Amendment freedom of religion guarantee.<sup>12</sup>

Respondents state (Br. 41) "it is the merest chance that these particular exemption claimants and/or advocates happen to be church organizations." But chance or not, petitioners *are* churches and the state is seeking, contrary to its power, to force the church to confess as to doctrine.

The position taken by petitioners here that state coercion on a church to confess orthodoxy breaches the wall of separation is not that of petitioners' alone. This same interpretation of religion is made by other responsible churches and groups of churches all over the country. In an appendix hereto we set out some of the statements.

Respondents view this oath effort on the part of the state as a small matter; the churches need "merely" (Br. 53) declare that they do not advocate the violent overthrow of our country or war-time support of her enemy. But if the State can require this, it can require more. "In these matters of the spirit inroads on legi-

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<sup>12</sup>A forthcoming book, *To Try Men's Souls: Loyalty Tests in American History*, by Dr. Harold M. Hyman is scheduled for publication by the University of California Press in the spring of next year. It will treat with the history of such oaths more extensively. We are making effort to promptly furnish the Court a copy of the manuscript.



timacy must be resisted at their incipency. This kind of evil grows by what it is allowed to feed on." (*Swearsy v. New Hampshire*, 354 U. S. 234, 263-4, concurring opinion.) It is time to stop the feeding.

### III.

#### **The Oath Required by Section 32 Violates Due Process Because It Is Too Broad and Vague (Reply to Respondents' Point III, pp. 26-33.)<sup>13</sup>**

It is difficult to understand how respondents can state (Br. 31, 32) that "it does not appear from the record or the opinion below that overbreadth was argued so that the California court might define the limits of the statute." In its opinion the court below said (R. F. 40):<sup>14</sup>

"Its provisions are plain and unambiguous and require no interpretation in the matter of their prohibitions."

Had not the court been requested to interpret, there would be little reason for it to have gone out of its way to make clear that it would not narrowly limit the meaning but would leave it as broad as the language permits.

Moreover in both complaints (R. F. 20, 29; R. V. 6) both petitioners urged from the very outset that the Oath violated the due process clause of the 14th Amendment because it is vague, indefinite and uncertain.<sup>15</sup>

<sup>13</sup>In their petitions and Opening Brief (see pp. 9-12 of the latter) petitioners argued that both Article XX and Section 32 contained the vice of vagueness. Respondents have replied only as to Section 32.

<sup>14</sup>Referring at this point to Article XX.

<sup>15</sup>R. F. 20: "The said Oath violates and denies the constitutional requirements of due process of law because of vagueness, uncertainty and indefiniteness . . . in violation of the due process of law provisions of the Fourteenth Amendment of the United States Constitution."

R. V. 5, 6: ". . . Section 32 of the Revenue and Taxation Code violate(s) . . . the due process clause of the 14th Amendment because of being vague, indefinite and uncertain."

Furthermore, the briefs of both petitioners specifically and succinctly argued the point to the court below and afforded ample opportunity for limitation to have been made were the court so minded.<sup>16</sup>

In the light of the specific refusal of the court below to narrowly interpret the statute, respondents' suggestion (Br. 32) that the formula adopted by this Court in *Garner v. Board of Education*, 341 U. S. 716, can be used to save the statute from its inherent vagueness is inappropriate.

Respondents refuse to read the language when they say (Resp. Br. 26) that the examples posed by petitioners (Pet. Op. Br. 9-10) are not examples of advocating "support of a foreign government against the United States." They certainly do not pose situations of support of the United States.

Moreover, respondents have failed to come to grips with the unavoidable vagueness of the term "support of

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<sup>16</sup>In No. 382, Petitioner's Opening Brief in the court below devoted its Point IV (pp. 68-69) to the point that "The terms of the oath at bar are so inexact and speculative as to be void and violative of due process; particularly is this so where the oath is applied in the area of religious belief and conscience as at bar." And in its Reply Brief, this same petitioner argued to the court below (pg. 22): "It is very strong in the law that statutes should be construed to *avoid* grave conflicts with Constitutional rights and requirements, and nowhere is greater deference to individual right paid, or greater effort expended to so contrive statutes as to avoid restrictions of individual liberty, than in the case of freedom of religion and of conscience." (Emphasis in original.)

In No. 385, Point II of Petitioner's brief below (pp. 25-35) was devoted to the argument that "... section 32 ... violate(s) due process of law and the First Amendment to the Federal Constitution in that (its) terms are so vague and indefinite as to serve as prior restraints upon religious belief and speech." From pages 32-35 of its brief, said petitioner argues that "The phrase: 'or who advocates the support of a foreign government against the United States' is so vague, indefinite and uncertain that men of ordinary intelligence must necessarily guess at its meaning."

a foreign government against the United States in the event of hostilities." While the court below refused to narrowly limit the term, respondents have apparently attempted to make their own interpretation, or, rather, interpretations,<sup>17</sup> namely, that the word "hostilities" means "war" or "war-time." The difficulty with respondents' so doing is that the court below did not thus narrowly limit the term to mean war; instead its meaning was left at large to just what it said: hostilities. Nor can it be argued that when the California legislature used the term "hostilities," it meant "war." When the California legislature means "war," it says so.<sup>18</sup> And when the California legislature means to specially define a term, including a term such as "war," it does so.<sup>19</sup>

Not only did the California legislature use the term "hostilities" and not "war," but it did not define the term, leaving it, as did the court below to its usual meandering. Webster's New International Dictionary (2d Ed., unabridged) defines "hostility" as

"state of being hostile, public or private enmity, unfriendliness; animosity."

Thus it is a word meaning something far less than war. During its history the United States has been involved

<sup>17</sup>"war-time support of a foreign government" (Br. 5); "war-time aid to the enemy" (Br. 7); "war-time support of an enemy" (Br. 8); "war support to her enemy" (Br. 13, 44); "war-time support of its enemies" (Br. 17, 42, 44, 51, 53, 59); "enemy support" (Br. 20) "Treason" (Br. 40); "war-time support of a foreign government against the United States" (Br. 40).

<sup>18</sup>E.g. Government Code §§45080, 19392, 26204, 29148, 32039, 68099, 18544, 6007, 74510, 1025, 19200, 19573, 18973; Ins. Code §§10248, 11730x; Military and Veterans Code §§146, 147, 1500; Penal Code §682; Code of Civil Procedure §354; Labor Code §§1850, 1812; Education Code §§14449, 14610; Public Utilities Code §§2727, 2728; Business and Professions Code §114.

<sup>19</sup>E.g. Business and Professions Code §114.5; Education Code §29; Fish & Game Code §429; Government Code §§45083, 53070; Military & Veterans Code §§18, 1635.

in but few wars, but it has been almost constantly involved in "hostilities." In Volume II of the publication "U. S. Marine Operations in Korea, 1950-1953" (The Inchon-Seoul Operation) (Historical Branch, G-3, Hq. U. S. Marine Corps, Washington, D. C., 1955) at page 11, we are told that:

"During the half century since the Spanish-American War, there had been only two years when U. S. Marines were not on combat duty somewhere. It had long been a tradition, that the Marines, as transitory naval forces, might land on foreign soil without the implications of hostilities usually associated with invasion. This principle was involved, along with a liberal interpretation of the Monroe Doctrine, by the State Department from 1906 to 1932 in the Caribbean and Central America. As a means of supervising unstable governments in sensitive strategic areas, Marines were sent to Cuba, Mexico, Haiti, the Dominican Republic, Nicaragua, and China for long periods of occupation."

But even criticism of even such endeavors are prohibited by the Oath.

Condemnation of some of our military enterprises in the past is not unknown. And advocacy of support of the object of our military power against the United States by responsible "non-treasonable" bodies and persons is likewise not unknown. For example, in 1847 the legislature of Massachusetts adopted a resolution (set out in the margin)<sup>20</sup> which can only be regarded as being in

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<sup>20</sup>From Old South Leaflets (Boston, 1883), Vol. VI, No. 132, pp. 138-167:

"Resolved, That the present war with Mexico has its primary origin in the unconstitutional annexation to the United States of the foreign State of Texas, while the same was still at war with Mexico; that it was unconstitutionally commenced by the order of the President, to General Taylor, to take military possession of territory in dispute between the United States and Mexico, *and in the occupation of Mexico*; and

support of Mexico and against the United States. And there was much said against our participation in the Philippines.<sup>21</sup>

Does the Oath of Section 32 prohibit such advocacies? What if, as happened in Massachusetts in 1847, California's policy was *contra* to that of Federal policy? What does the Oath now mean? Who is the Church to follow? It must be remembered that this portion of the Oath has nothing to do with the state. No guidance is given the conscientious oath taker as to whether the

---

that it is now waged ingloriously,—by a powerful nation against a weak neighbor,—unnecessarily and without just cause, at immense cost of treasure and life, for the dismemberment of Mexico, and for the conquest of a portion of her territory, from which slavery has already been excluded, with the triple object of extending slavery, of strengthening the 'Slave Power,' and of obtaining the control of the Free States, under the Constitution of the United States.

*"Resolved, That such a war of conquest, so hateful in its objects, so wanton, unjust, and unconstitutional in its origin and character, must be regarded as a war against freedom, against humanity, against justice, against the Union, against the Constitution, and against the Free States; and that a regard for the true interests and the highest honor of the country, not less than the impulses of Christian duty, should arouse all good citizens to join in efforts to arrest this gigantic crime, by withholding supplies, or other voluntary contributions, for its further prosecution, by calling for the withdrawal of our army within the established limits of the United States, and in every just way aiding the country to retreat from the disgraceful position of aggression which it now occupies toward a weak, distracted neighbor and sister republic."* (Italics in original.)

<sup>21</sup>E.g. the platforms of the American Anti-Imperialist League, Chicago, Oct. 18, 1899 contained the following (Speeches, Correspondence and Political Papers of Carl Schurz, edited by Frédéric Bancroft; N. Y. 1913; Vol. VI, pp. 77-79):

"We earnestly condemn the policy of the present National Administration in the Philippines. . . . We deplore the sacrifice of our soldiers and sailors, whose bravery deserves admiration even in an unjust war. We denounce the slaughter of the Filipinos as a needless horror. We protest against the extension of American sovereignty by Spanish methods.

"We demand the immediate cessation of the war against liberty, begun by Spain and continued by us. . . ."



Nicaraguan or Haitian operations by our marines are included. And if the oath does encompass such matters has not the State gone too far?<sup>21a</sup>

In a concurring opinion in *American Communications Association v. Douds*, 339 U. S. 382, 420 it was said:

" . . . It should not be assumed that oaths will be lightly taken; fastidiously scrupulous regard for them should be encouraged. . . . If a man has scruples about taking an oath because of uncertainty as to whether it encompasses some beliefs that are inviolate, the surrender of abstention is invited by the ambiguity of the congressional exaction. . . .

The cardinal article of faith of our civilization is the inviolate character of the individual. A man can be regarded as an individual and not as a function of the state only if he is protected to the largest possible extent in his thoughts and in his beliefs as the citadel of his person. Entry into that citadel can be justified, if at all, only if strictly confined so that the belief that a man is asked to reveal is so defined as to leave no fair room for doubt that he is not asked to disclose what he has a right to withhold."

The oath at bar does just that. To paraphrase the same thought expressed in the concurring opinion in *Garner v. Board of Public Works*, 341 U. S. 716, 727, 728:

" . . . Not only does the oath make an irrational demand. It is bound to operate as a real deterrent to people contemplating even innocent (utterances)

"Giving full scope to the selective processes open to our municipalities and states in securing (churches) free from allegiance to any alien political authority, . . . it is (not) consonant with the Due Process Clause for (churches) to be asked, on pain of giving up (the traditional church tax exemption), to swear to something they cannot be expected to know . . ."

---

<sup>21a</sup>Cf. *Butler v. Michigan*, 352 U. S. 380.

Accordingly it is clear that even aside from the question as to whether the majority below correctly applied the law as to when advocacy can be prohibited and when it cannot, the Oath here must fall because of its vagueness concerning what is prohibited and its broadness in prohibiting utterances even at times of small, if any, peril.

Respondents are incorrect in their assertion (Br. 27) that the court below correctly drew the line between the type of advocacy that could and could not be prohibited. The court below drew no such line at all. The line it drew was between action and belief (R. F. 47), and then it equated advocacy with action and thus prohibitible. But its citation (R. F. 47) of *Gitlow v. New York*, 268 U. S. 652 for the proposition that advocacy equals action is not apposite. That case did not so hold.

The true meaning of the majority below as to where the line may be drawn is seen from its analogizing the present case with *Dennis v. United States*, 341 U. S. 494, and its understanding (R. F. 53) of the instruction in that case "that if the defendants actively advocate governmental overthrow by force and violence as speedily as circumstances would permit, then as a matter of law . . . there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution." After thus quoting only part of the instruction from *Dennis* and leaving out the very part as to "incitement to action" which this Court found fatal in *Yates v. United States*, 354 U. S. 298, the court below then went on to say (R. F. 53): "In the present case the constitutional provision is concerned with those who advocate the same prohibited activity." But if the advocacy being considered is advocacy absent incitement to action then, as *Yates* makes clear, such advocacy cannot be pro-

hibited. As previously pointed out (Pet. Op. Br. 14-15) the dissent below made no such error.

But even if the court below did constitutionally apply the word "advocacy" to the force and violence part of the Oath, it made no effort to even discuss its application to the support of a foreign government in the event of hostilities part of the Oath. And the attempt to apply it to that portion of the Oath leads to naught save to demonstrate the impossible and inherent vagueness of the Oath. How can one now advocate (in the sense of now inciting to action) support of a foreign government against the United States *in the event* of hostilities, whatever and whenever and against whomever those may be. While perhaps, technically, one can engage in the mental gymnastics necessary to achieve so remarkable a condition of mind, "constitutional rights should not be frittered away by arguments so technical and unsubstantial." (Brandeis, J. dissenting in *U. S. ex rel. Milwaukee Social Democratic Publishing Company v. Burleson*, 255 U. S. 407, 431.)

The Oath requires petitioners to swear as to an uncertainty. It is therefore too vague to stand.

### Conclusion.

The decisions below should be reversed.

Respectfully submitted,

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*Of Counsel.*

## APPENDIX.

### Excerpts From Statements by Churches Concerning the California Loyalty Oath for Churches.<sup>1</sup>

#### American Baptist Convention.<sup>2</sup>

"If the state can exact a loyalty oath as the price for tax exemption today, tomorrow it can redefine the meaning of loyalty and demand that the church curriculum and the pulpit come under the state-imposed definition.

"To admit to this threat to freedom itself where there is no justified question of loyalty to the state is to invite control when there may be every reason to challenge the claims of the state in the name of God. The question of loyalty is not the issue. No group has been more loyal than Christians. The question is one of segregation of church and state, of the free exercise of religion. To grant that the state can exact an oath of allegiance, define loyalty and impose penalties is to surrender freedom itself. . . ."

#### Methodist Discipline.<sup>3</sup>

"We protest legislation requiring the loyalty oath of any church to any state or nation. The church must be in the world but not of it. She belongs to no class, nation, or race. She belongs to Christ. The Church cannot serve two masters. She can obey but one, Jesus Christ. The Church must be free to bring all persons and institutions

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<sup>1</sup>This compilation is by no means intended to be exhaustive but is set forth here simply by way of example.

<sup>2</sup>Atlantic City, May 24, 1955.

<sup>3</sup>These quotations are taken from pages 3 and 4 of the motions by the First Methodist Church of San Leandro and the First Unitarian Church of Berkeley for leave to file a brief *amicus* to argue orally herein.

under the judgment of the gospel. In so far as the state is righteous, it has nothing to fear from the Church. In loyalty to her Lord the Church will be its grave and sturdy ally. But in so far as a state seeks to dominate, the Church must resist. Freedom is secure and justice is maintained only as the Church lives and works among free men, not as a creature subservient to the state, but as a free, unintimidated voice, speaking for Almighty God in opposition to error and evil, and in support of truth and righteousness."

Paragraph No. 2025 of The Methodist Discipline, 1956.

"We declare our support for those churches which are testing the constitutionality of the California law which requires a non-disloyalty declaration as a prerequisite for tax exemption. We hope that all of our churches will find ways of saying unequivocally that the church belongs to God and not to the state. We are loyal to our state and nation, but if that loyalty ever conflicts with our loyalty to God we must serve God first."

Statement Adopted by the California-Nevada Annual Conference: Page 136 of California-Nevada Annual Conference Journal, 1954.

"We must protect the freedom of the church to make moral judgments without coercion from any political institution."

Statement Adopted by the California-Nevada Annual Conference: Page 131 of California-Nevada Annual Conference Journal, 1955.



**American Unitarian Association.<sup>4</sup>**

**"WHEREAS:** California has amended its Constitution and enacted laws requiring a 'Loyalty Oath' of all churches claiming tax exemption;

**"WHEREAS:** Such Constitutional amendment and laws violate the traditional separation of Church and State and seek to establish State control over present and future actions and utterances by the Church in matters of conscience; and

**"WHEREAS:** This Constitutional amendment and these laws are contrary to the American tradition and are an abuse of the taxing power;

**"THEREFORE BE IT RESOLVED:** That the American Unitarian Association go on record as condemning this Constitutional amendment and these laws as an attack on freedom of religion and as supporting efforts to test its constitutionality in the courts."

**Southern California Council of Protestant Churches.<sup>5</sup>**

**WHEREAS,** this legislation violates the essential nature of the Church for such reasons as:

1. The Church is more than a human institution. She is Divine. She has been provided for mankind by God through the life, and continuing presence of Jesus Christ; existing among men as the Body of Jesus Christ.

2. The Church rises above all divisions of politics, class, nation, or race, to serve all mankind as God's in-

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<sup>4</sup>R.F. 15, 25. It is noted that among the leaders of Unitarianism are Thomas Jefferson, William Ellery Channing, Joseph Priestly, Francis David and Michael Servetus. [R.F. 14, 24.]

<sup>5</sup>Part of a statement signed by some 600 ministers March 11, 1957, and adopted by the Federation on March 26, 1957.

strument for salvation. She exists through a fellowship which transcends all man made boundaries and barriers.

3. The Church belongs to no class, nation, or race. She belongs to Jesus Christ and to Him alone. Hence, her loyalty belongs to Christ alone. The Church cannot serve two masters. She can obey but One, Jesus Christ.

4. The Church has given birth and nourishment to laws and principles in United States Government which recognize the Church's divine origin and separation.

5. The Church must be free to summon all persons and institutions to repentance, including heads of government and government itself. Insofar as the state is righteous it has nothing to fear from the Church of Jesus Christ. It needs no loyalty oath. The Church in loyalty to Jesus Christ will be its strongest and bravest support, even as she has been for the United States of America. But insofar as the state be evil, let it fear and tremble, for the Church in loyalty to Jesus Christ must be its most unrelenting opposition; a stern voice of rebuke and judgment, an unflinching and practitioner of redemptive love.

6. When the state presumes to define under what conditions the Church constitutes a medium of expression for subversion it arrogates to itself the power to regulate the nature of the Church and its forum of communication.

WHEREAS, this legislation violates the essential spirit of Americanism which was born of people, who knowing the tendency of a state toward overweening power, were determined that these United States should be a nation under God, and who believed that no government will long honor the restraints which guarantee freedom and dignity for the individual unless that government bows in allegiance to Higher Law than its own self-interest and a Higher Power than its own, and

WHEREAS, this legislation violates the Constitution of the United States which provides for separation of Church and State, and

WHEREAS, a loyalty oath is futile as a device for discovering the existence of treason since those plotting treason would welcome it as good "cover," punishment for perjury being of slight consequence compared with apprehension for treason, and

WHEREAS, this legislation is part of the current hysteria in which some citizens consider it an act of patriotism to be suspicious of the patriotism of others, and

WHEREAS, this legislation appears to rest upon the assumption that a person or organization is guilty unless he or it specifically declares otherwise, an assumption contrary to the law and traditions of freedom in our land, and

WHEREAS, loyalty oaths through the centuries have been used as a coercion device of tyranny for securing conformity and repressing freedom, and

WHEREAS, freedom is secured and justice maintained only as there stands in the midst an Institution not subservient to or controlled by the State, but a free and unintimidated voice speaking for Almighty God in support of righteousness and in opposition to evil.

**South Bay Area Ministerial Association.\***

" . . . this law is a departure from the long American tradition and constitutional guarantees of the separation of church and state."

---

\*The Churchman, April 1, 1954, page 6.

**Northern California-Nevada Council of Churches.<sup>7</sup>**

“ . . . Even though most of our churches have signed this oath and even though we castigate Marxian Communism for the atheistic system which it is, still we protest the loyalty oath requirement. . . . We hold that . . . it is a movement of the State into the hitherto free area of men's minds. . . . ‘Over every state,’ one of our teachers has reminded us, ‘there broods something of the light of the divine creation and a heavy cloud of anti-divine forces.’ We see in this oath the first lowering of the dark cloud and it alarms us!”

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<sup>7</sup>Form letter dated April 18, 1957, circulated for the Council by the Council's Commission on Legislation and Public Morals.

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IN THE  
**SUPREME COURT**  
OF THE  
**United States**  
**October Term, 1957**

THE FIRST UNITARIAN CHURCH OF LOS  
ANGELES, a corporation,

*Petitioner,*

vs.

COUNTY OF LOS ANGELES, CITY OF LOS  
ANGELES, H. L. BYRAM, County of Los An-  
geles Tax Collector, and JOHN R. QUINN,  
County of Los Angeles Assessor,

*Respondents.*

VALLEY UNITARIAN - UNIVERSALIST  
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CITY OF LOS ANGELES, CALIFORNIA;  
H. L. BYRAM, County Tax Collector,

*Respondents.*

**RESPONDENTS' CONSOLIDATED BRIEF**

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County of Los Angeles Assessor,

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No. 382

VALLEY UNITARIAN - UNIVERSALIST  
CHURCH, INC.,

*Petitioner,*

vs.

COUNTY OF LOS ANGELES, CALIFORNIA;  
CITY OF LOS ANGELES, CALIFORNIA;  
H. L. BYRAM, County Tax Collector,

*Respondents.*

No. 385

**RESPONDENTS' CONSOLIDATED BRIEF**

**STATEMENT OF THE CASE**

Petitioners' "Statement of the Case" requires notice and a cautionary word. In one recital it is either argumentative or by purported factual statement assumes the very point in issue. It says:

"Under Article XIII Section 11½ of the California Constitution, by reason of said sole and exclusive use for religious worship, said property is entitled to tax exemption." (Pet'r. Consol. Op. Br. p. 4.)

Whether "said property" is indeed "entitled to tax exemption" is the very issue in the case. The issue herein and the doubt as to petitioners' right to tax exemption arise by reason of the further and later provision of the same Constitution which withholds exemption otherwise authorized if the property owner, contrary to the public interest, advocates violent overthrow of government or war-time support of an enemy. The exemption which the People by adopting Constitution Article XIII, Section 11½ had before granted as to "property used solely and exclusively for religious worship" they later modified by amending their Constitution and by adopting the further provision, Article XX, Section 19, whereby they limited, and to a degree withdrew, the earlier grant of exemption. The People thereby declared that thereafter they withheld exemption from those who advocate the violent overthrow of government or wartime support of an enemy. This limitation applies not only to churches but to all who claim tax exemption.

Further, petitioners' "Statement of the Case" then continues:

"Respondents refuse to allow petitioners the church exemption not because the churches did,

or because respondents claim they did, advocate either of the doctrines proscribed by Article XX, Section 19 of the California Constitution." (Pet'r. Consol. Op. Br. pp. 4-5).

Again, in this, petitioners make representation which is not factual. The disqualification is not, as petitioners state it, because they "advocate the (doctrine of) the overthrow of the Government of the United States . . . or advocate the (doctrine of) the support of a foreign government against the United States . . ." (parentheses indicate petitioners' insertions). Petitioners' insertion twice of the phrase "the doctrine of" constitutes a material change in the provision. It is permissible for petitioners to *argue* that the question herein and the provision of the California Constitution and statute concern advocacy of *doctrine*, but it is not permissible for petitioners to represent it as fact, in the "Statement of the Case". One of the issues herein to be argued and determined is whether the question at issue and the provisions of the California Constitution and statute are not precisely as they declare, advocacy of violent overthrow and advocacy of war-time enemy support.



## SUMMARY OF THE ARGUMENT

The main theme and course of argument throughout this brief will be that the California laws withdrawing property tax exemption from advocates of certain types of action were not enacted to punish those who advocate such action. Rather the exemption was withdrawn because such advocacy is *inconsistent* with the legitimate purposes and ends sought to be accomplished by the exemption. In these cases the prime issue, we think, is whether or not the state interests sought to be forwarded by the church exemption are of sufficient weight to justify the slight restriction on speech and the possible slight restriction on religious practice of those who advocate violent unlawful action and war-time support of enemies of the United States.

Point I of this brief will point out that it is a state tax law which is being challenged here; that the power to tax is a sovereign power of the state; that a church, or any other exemption claimant, has no inherent right to exemption, and that in the exercise of the power to tax, taxation is the rule and exemption the exception. The basis for and rationale of exemptions is that the state has found that some benefit to the state from the recipient of the exemption compensates for the diminution in tax revenue. The state sets the standard and if the property owner does not meet and show that he meets the standard, he is not entitled to the exemption.

Point II will consider the determination by the People of California that property owners advocating violent overthrow of government or war-time support of a foreign government against the United States do not benefit the state and should not receive tax exemption. Such determination is reasonable and Section 32 of the California Revenue and Taxation Code is reasonable implementation thereof.

Point III will defend the declaration, by Section 32 provided for and required, against the charge of vagueness. Petitioners do not assert and have not shown in what way they have been misled. "Advocate" had become a word of art; to advocate means more than to merely believe. This Court has upheld many statutes and oaths similar to the subject declaration against the charge of constitutional vagueness. When either constitutional or unconstitutional interpretation is possible, the Court will assume that the interpretation made is the constitutional application, unless actual unconstitutional application is shown.

Point IV will show that California does not deny the equal protection of the laws by excepting the householder's exemption of \$100 from the requirement of a declaration from the property owner seeking such exemption. The state can make reasonable classifications for tax purposes. As a matter of history, California has traditionally excused the householder from certain of the requirements otherwise laid for property tax exemption.

Point V will show that there is no violation of First and Fourteenth Amendment rights such as to render unconstitutional the declaration here required. Exemption is granted the church on non-religious grounds, and similarly, can be refused on non-religious grounds. Requiring a declaration from petitioners does not infringe upon their religious rights—they have no objection to but have made other sworn declarations in their tax return and of record herein. The declaration here required does not concern religious opinion or belief nor violate the freedom of speech. The state's contrary interest herein is sufficient to outweigh a possible minor restriction of absolute freedom of speech.

Finally, Point VI will show that the provisions of the California statute is not precluded by Federal occupation of the field. This is a state tax statute and in no way conflicts with the administration of the Smith Act.

## ARGUMENT

### I.

**Article XX, Section 19 of the California Constitution and Section 32 of the California Revenue and Taxation Code Are a Valid Exercise of the State's Sovereign Power to Tax.**

**A. Church Property Has No Inherent Right to Tax Exemption.**

Article XX, Section 19 of the California Constitution and Section 32 of the California Revenue and Taxation Code prescribe conditions on which California grants exemption from taxation. Article XX declared the State's intention to administer tax policy for the general welfare of the citizens of California by refusing to bestow by tax exemption a public bounty to those who advocate the violent overthrow of the government or war-time aid to the enemy. The California Legislature implemented this provision by statute withholding the subsidy from organizations and persons who refuse to declare that they do not so advocate. By Constitution and statute California has expressed its sovereign interest to encourage and foster moral standards and conduct.

The power to tax is an inherent and indispensable attribute of state sovereignty. Co-extensive and co-equal with the basic power to tax is the power to exempt from taxation. The administration of its tax policy

is an area peculiarly within the jurisdiction of the states. A state has the power to tax church property. Such property has no Federal immunity from non-discriminatory taxation (*Watchtower Bible & Tract Society v. Los Angeles County*, (1947) 20 Cal. 2d 426, 182 P. 2d 178, cert. denied (1947) 332 U.S. 811). Petitioners' claim to tax exemption can be based only on the Constitution of California and the statutes passed pursuant thereto, provisions with which they have refused to comply.

Tax exemption granted by California Constitution Article XIII, Section 11½ is validly qualified by Article XX, Section 19. The exemption which the People in 1900 granted to "property used solely and exclusively for religious worship," they modified and limited, and to a degree withdrew in 1952, by adopting Article XX, Section 19. Thereby the People validly declared that they withhold exemption from those who advocate the unlawful violent overthrow of government or war-time support of an enemy. This limitation applies not only to churches but to all others claiming tax exemption. As the California Supreme Court stated herein, "a church organization is in no different position initially than any other owner of property with reference to its obligations to assist in the support of government by the payment of taxes. Church organizations, however, throughout the history of the state, have been made special beneficiaries by way of exemptions" (Tr. of Record p. 38).



Exemption from taxation is a gratuity or favor. It is not a right; and omission by the law to grant, or enactment to withhold exemption does not *ipso facto* deprive of legal or constitutional right. Nor do the Federal requirements of due process or equal protection impose any rigid rule of equality of taxation. Instead, legislation may make distinctions having a rational basis and purpose. This is recognized and declared in the decisions of this Court. As stated in *Ohio Oil Co. v. Conway*, 281 U.S. 146, 74 L.Ed. 775:

“The states, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the 14th Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. . . . In levying such taxes, the state is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the state to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the 14th Amendment was intended to assure. . . .” (p. 782)

Petitioners charge that the provisions of California Constitution and statute violate the equal protection clause of the Fourteenth Amendment (Pet'r Consol. Op. Br. pp. 3-4, 38). They say that “the classification

... is not reasonable, it is arbitrary and does not rest upon any ground of difference having a fair and substantial relation to the object of the legislation. Both Article XX and Section 32 deny equal protection" (ib p. 41). Specifically, they allege that the classification "... depends not upon the nature of the property, its value, extent, location, use, nor any other factor relating to the property but rather upon unrelated non-advocacy of the owners" (ib. p. 40). Their objection to the classification that it "does not rest upon any ground of difference having a fair and substantial relation to the object of the legislation" is merely stated without accompanying analysis. As to the objection that the classification is based on the character or behavior of the owner rather than on the nature of the property itself, the clear answer is that such constitutes one of the traditional bases of classification for tax exemption. Exemption may be granted on the basis of ownership or on the basis of the nature and use of the property. The former, no less than the latter, constitutes valid basis for classification. This Court has said:

"A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it . . .

"This restriction upon the judicial function, in passing on the constitutionality of statutes, is not

artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution . . .” (*Car-Michael v. So. Coal & Coke Co.*, 301 U.S. 509, 81 L.Ed. 1245, p. 1253)

The Fourteenth Amendment is not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways (*Bell's Gap R. R. Co. v. Commonwealth of Pa.*, 134 U.S. 232, 33 L.Ed. 892)

In *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 72 L.Ed. 770, the Court said:

“The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. . . It does not . . . forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. . .” (p. 773)\*

\**Rogers v. City of Hennepin*, 240 U.S. 148, 60 L.Ed. 594, involved a Minnesota statute taxing membership in the Chamber of Commerce while exempting other organizations such as the Associated Press, and Lodges, Fraternal Orders and Churches. The Court held this was not a denial of equal protection, saying that the exempt organizations present manifest distinctions which the state is entitled to observe in its taxing policy.

As the California court declared herein as to Article XX Section 19:

“By its enactment the People of the state declared the public policy of withholding from the owners of property in this state who engaged in prohibited activities the benefits of tax exemption.” (Tr. of Record p. 41)

In another case the California Appellate Court said:

“The right to make exemptions is involved in the right to select the subjects of taxation and apportion the public burdens among them and

By virtue of its sovereignty, the state has the inherent right to determine what taxes shall be levied, what exemptions shall be granted, and what administrative provisions must be complied with. This right is subject only to the limitation that the policy be reasonable and be consonant with the public welfare.

**B. A Tax Exemption Is Justified Only on the Ground That the Exempted Property Performs a Public Service or Affords a Public Benefit.**

In granting exemptions to religious organizations the theory is that the exempt property performs functions which, if performed by a public agency, would entail expense to the taxpayers equal to or in excess of the loss of revenue resulting from the exemption.

Tax exemption to religious organizations is justified on the ground that the teachings and influence of religion make better citizens, and that the church and its activities render benefits to the state and to the

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must, consequently, be understood to exist in the lawmaking power whenever it has not in terms been taken away. (1 Cooley on Taxation, p. 343.)" (*San Francisco v. McGovern*, 28 Cal. App. 491, 512.)

An exemption granted by the People may by the People be withdrawn. *McCoppin v. McCartney*, (1882) 60 Cal. 367, involved a constitutional exemption of property terminated by change of the Constitution. The California Constitution of 1849 exempted or excused from taxation mortgages on real property. Then the new 1879 Constitution taxed the mortgaged property as between mortgagor and mortgagee, declaring the mortgage to be an interest in the property and taxable to the mortgagee. The case involved the question of the taxability in 1880 and after the adoption of the 1879 Constitution of a mortgage executed within the period of the Constitution of 1849 and in the period of mortgage exemption. The Court held that the earlier exemption had been terminated and validly withdrawn, saying:

"... a mortgagee, prior to the adoption of the new Constitution, did not have a vested right of exemption from taxation which extended beyond the life of the former Constitution. . . . The plain intent of the new Constitution is to subject to taxation classes of property previously exempt. . . ." (p. 371)

general public, whereby the state gets back in the benefits from personal conduct and private and public morality what it loses in money. People perform public services they otherwise would not perform and refrain from public misconducts they otherwise would not refrain from. The benefit is expected to be found in the church's influence and work and the result thereof in maintaining and raising the standards of civic and private virtue and the ideals and conduct in public and private life. If, however, the influence of the exemption recipient is inimical to such results and it fails to forward such purpose, the justification for the exemption is gone, and the exemption should be and may validly be withheld or withdrawn. Advocacy of the violent, lawless overthrow of one's government or of war support to her enemy are contrary to the moral sense of our people and are to the prejudice and injury of the state and the general welfare. Such acts are akin to treason and certainly outside the realm of good moral conduct. The church that so advocates no longer benefits the state. Withdrawal of the gratuity and the benefit of exemption is calculated to encourage moral behavior and to discourage the specified advocacies.

Seventy-five years ago the Federal District Court of California made an incisive statement of the justification of church tax exemption:

"The public benefit is the equivalent to the state for the tax which would otherwise be exacted. If buildings, used as churches for public worship,



are also sometimes exempted, it must be because, apart from religious considerations, churches are regarded as institutions established to inculcate principles of sound morality, leading citizens to a more ready obedience of the laws. Whatever the exemption, it can only be sustained for the public service or benefit received." (*Santa Clara v. Southern Pacific R. R.*, (1883) 18 Fed. 385, 400.)

This holding was affirmed by this Court in 1886 (118 U.S. 394):

**C. The Burden Is on the Property Owner Asserting a Right to Tax Exemption to Qualify and Show His Right Thereto.**

The activities of or incident to the secular life of the community are the direct concern of the government and may be such, even though carried on by a religious organization (*Prince v. Massachusetts*, (1944) 321 U.S. 158).

The Supreme Court of California has summarized the secular activities of the church and the state's interest therein as follows:

"Religious organizations engage in various activities such as founding colonies, operating libraries, schools, wineries, hospitals, farms, industrial and other commercial enterprises. Conceivably they may engage in virtually any worldly activity, but it does not follow that they may do so as specially privileged groups, free of the regulations that others must observe. If they were given such free-

dom; the direct consequence of their activities would be a diminution of the state's power to protect the public health and safety and the general welfare. With that power so easily diminished there would soon cease to be that separation of church and state underlying the constitutional concept of religious liberty." (*Gospel Army v. Los Angeles*, (1945) 27 Cal. 2d 232, 245, 163 P. 2d 704, 712, appeal dismissed (1947) 331 U.S. 543).

Inasmuch as it is secular activities which afford the justification for the church's tax exemption, the state properly administers the exemption within its general administrative powers, and properly puts the burden on the church to qualify for the exemption. Carl Zollman, one-time law professor at Marquette University and a thoughtful writer on the relationship of church and state, says:

"Since taxation is the normal condition, while exemption is an abnormality, the leaning of the judicial mind naturally is toward taxation and away from exemption. It follows that the exemption claimant has the burden of proof. He must point out the statute or constitutional provision under which he claims his privilege. He must bring his case either literally or by clear intendment within the terms of such statute or constitutional provision." ("Tax Exemptions of American Church Property" 14 Mich. L. Rev. 646, 653.)

The state has the right and power, and, indeed, the duty, to take all reasonable steps to assure that the

activities of a church claiming exemption are of value to the public. A church or any other property owner seeking exemption must comply with any reasonable regulation enacted to assist the state in determining the claimant's right to the exemption and whether the particular grant is in fact in the public interest.

Withdrawal of tax exemption from such advocates is not a penalty, and the provision therefor does not impose a penalty. The exemption is withdrawn because the purpose in granting exemption is no longer accomplished. The farmer fertilizes his crops; he does not fertilize the weeds. He does not therefore "penalize" the weeds. The crops forward his farm purposes; the weeds do not.

## II.

**Article XX, Section 19 of the California Constitution Constitutes Valid Provision of Conditions Under Which Tax Exemptions Will Be Granted or Withheld, and Section 32 of the Revenue and Taxation Code Is a Reasonable Means of Ascertaining Whether the Conditions Are Met and Whether an Applicant is Eligible.**

Since the exemption to religious organizations stands only upon the ground that such organizations further particular aspects of the public interest, the exemption may be withdrawn when such aspects of the public interest are no longer served. By the adoption of Article XX, Section 19 the People of California have determined that the public interest fostered by church exemption is not being served by organizations advocating the violent overthrow of the government or war-time support of its enemies. It is difficult to conceive of activities more antagonistic to the basic interests of our society. The People cannot be said to have acted unreasonably in deciding no longer to subsidize by tax exemption activities inconsistent with the purposes and ends intended by such exemption.

Civil Liberties Union charges that the oath requirement has no relation to or bearing on the reason for granting church exemption. The brief says "The oath requirement bears no relation to the traditional universal reasons for granting tax exemption to church

properties" (p. 14). On the contrary, the statute is indeed an implementing statute and its machinery is direct to accomplish the constitutional purpose. The question whether the statute is a legitimate interpretation of the constitutional provision and not in conflict therewith is not for this Court. The State Supreme Court is the final arbiter on the question of any conflict between a state statute and the state Constitution (*Michigan Central R. R. v. Powers*, (1906) 201 U.S. 245)..

Furthermore, of course, any attack on the reasonableness of the statute must meet and overcome the presumption favoring the validity of legislative enactments (*Graves v. Minnesota*, (1926) 272 U.S. 425). In *American Communications Assn., CIO v. Douds*, (1950) 339 U.S. 382, the Court said:

"But insofar as the problem is one of drawing inferences concerning the need for regulation of particular forms of conduct from conflicting evidence, this Court is in no position to substitute its judgment as to the necessity or desirability of the statute for that of Congress." (p. 400).

And the Court continued:

"In *Bridges v. California*, *supra*, we said that even restrictions on particular kinds of utterances, if enacted by a legislature after appraisal of the need, come to this Court 'encased in the armor wrought by prior legislative deliberations.' 314 U.S. at 261." (p. 401).



Even absent this presumption it would appear clearly reasonable for the Legislature to determine what organizations qualify for the exemption by the simple expedient of asking them to state their qualifications. To oblige the state to ascertain the facts to justify a claimed exemption would impose on the government a difficult and unnecessary burden and expense. It would require determining whether a group was a religious organization, whether the property was "used solely and exclusively for religious worship" and the other requirements specified for exemption. Since liability is the rule and exemption the exception, the burden clearly is on the property owner to show that he comes within the exemption. The statutory scheme universally requires that the claimant of exemption assume the burden of providing the necessary information.

The present cases concern a civil statute requiring from the claimant of exemption a declaration of the facts necessary thereto, *inter alia*, that the claimant "... does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in the event of hostilities." Petitioners did not object to filing a statement and declaration that they are religious organizations and that the property claimed exempt is "used solely and exclusively for religious worship". What petitioners refused to de-

clare is no less essential to exemption. It is not unreasonable to extend the general statutory scheme of requiring declarations of essential facts to include the matter of overthrow of the government and enemy support.

This conclusion as to the reasonableness of the statute is supported by judicial approval of similar provisions. In *Douds, supra*, the Court upheld the requiring of a non-Communist affidavit from officers of unions seeking to be established as proper bargaining agencies. The Court declared that Congress, with a legitimate concern for keeping the channels of interstate commerce open, could take steps to prevent improper strikes and, as a means thereto, could block communists from leadership in unions. The act of Congress, upheld by the Court, required a declaration like that herein. Referring to this method of implementing the policy decision, Mr. Justice Jackson said:

"I have sometimes wondered why I must file papers showing I did not steal my car before I can get a license for it. But experience shows there are thieves among automobile drivers, and that there are Communists among labor leaders. . . .

"I conclude that we cannot deny Congress power to take these measures under the Commerce Clause to require labor union officers to disclose their membership in or affiliation with the Communist Party." (p. 435).

*Shub v. Simpson*, (1950) 196 Md. 177, 76 A. 2d 332, *Aff'd sub. nom. Gerende v. Board of Supervisors*, (1951) 341 U.S. 56, upheld requiring a like declaration as prerequisite to a candidate's name appearing on the ballot in an election for public office. Maryland statute required that the candidate declare that he was not subversive, under provision of the State Constitution barring from public office one who "... advocates the overthrow of the Government of the United States or of the State of Maryland through force or violence ..." The Court said:

"We construe the affidavit required by Sec. 15 with respect to those desiring to become candidates for public office as a means of preventing such infiltration at its initial stage ..." (196 Md. at 192, 76 A. 2d at 338.)

Petitioners herein did not qualify or show themselves entitled to the claimed exemption. Upon the record herein they failed to meet the requirement of either the Constitution or the statute. They have not made the declaration in their property return to the Assessor that they do not advocate; also, they have not so alleged in their complaints initiating the present litigation. They have not alleged that they come within the provision of the Constitution and they affirmatively show that they do not come within the statute.

Section 32 is an evidentiary provision. Its purpose and effect are to afford to the Assessor information to guide his compliance with and his enforcement of

the Constitution's prohibition against tax exemption to subversives and to provide a method of answering the question of exemption right or of disqualification. Section 32 sets up and prescribes a procedure for ascertaining and evidencing the fact. Its effect is, by the required declaration, to negative subversive character, and to evidence and determine the factual basis for the right to exemption. The declaration when made constitutes *prima facie* evidence of the applicant property owner's non-subversive character. If the declaration is not made the want constitutes failure to meet the prescribed condition for exemption and negatives the right.

Petitioners mistakenly construe Section 32 as setting up a conclusive presumption. They say "the oath creates a conclusive presumption of guilt . . ." (Pet'r Consol. Op. Br. p. 8); and again, that "it creates a conclusive presumption that every one who refuses to sign the oath advocates the overthrow of the government . . ." (ib. p. 36). The waiver or disqualification turns on neither a conclusive nor any presumption of advocacy. It turns on the failure to qualify for the exemption within the statute.

American Civil Liberties Union objects that the California *Constitution* denies tax exemption to those who advocates but that the *statute* denies tax exemption to those who refuse to declare that they do not advocate (p. 10). The statute is an implementing statute and of a kind with others which the California Supreme Court

has declared valid, e.g., the statute requiring the veteran to claim his constitutional tax exemption under penalty of forfeiture for want of claim (*Chesney v. Byram*, 15 Cal. 2d 460); the requirement of statute to file claim of compensation for the taking or damaging of property for public purposes (*Crescent Wharf etc. v. City of Los Angeles*, 207 Cal. 430; *Sala v. City of Pasadena*, 162 Cal. 714); the statutory requirement to register as a condition to exercise of the electoral franchise (*Chester v. Hall*, 55 Cal. App. 61); the requirement of a period of residence within the jurisdiction as a condition of the exercise of the electoral franchise (*Bergevin v. Curtz*, 127 Cal. 86). As to the implementing statute in the veteran case, no presumption was necessary or was raised that Chesney was not a veteran because he did not claim the veteran exemption. Admittedly he met all the conditions for exemption under the grant by the Constitution, but he had not qualified to receive it. He had not followed the method prescribed by the Legislature; he had not claimed the exemption, and the State Supreme Court held that therefore he was not entitled.

Petitioners notice that a dissenting opinion herein by a Judge of the California court commented that "there is no evidence that any church has advocated, or intended to advocate, . . ." (ib. p. 38); and earlier, the brief says that "there is no showing, and indeed, no contention that churches have engaged, or that there is *any* danger that they might engage, . . . in advocacy of doctrine proscribed by the provisions" (ib. p.



32). Similarly, American Civil Liberties Union objects that "there was no finding and there was no charge or evidence that petitioners had engaged or were engaging in such advocacy" (p. 9); and again that petitioners "... are not found to be actually engaging in advocacy ... ." (p. 11). Naturally and necessarily there was "no showing" and "no finding", for, as the brief itself notices, "the facts are not in dispute, the allegations in the complaints being admitted by the general demurrers ... ." (ib: p. 4). Non-advocacy or exemption right as based thereon was not pleaded or made an issue in the cases. The complaints made no allegation as to advocacy or non-advocacy, i.e., failed to allege that petitioners were qualified under the Constitution; also affirmatively admitted that petitioners had not qualified by declaration, under the statute, Advocacy was not put in issue and under the pleadings there could be no "showing ... that churches have engaged" in advocacy.

The situation would be essentially different in a case where a plaintiff pleaded that it did not advocate but that it merely failed or refused to make declaration thereof under the statute, and contended then that it was nevertheless entitled under the provisions of the Constitution. This would have raised question as to right under the provision of the Constitution despite the implementing statute denying exemption by reason of failure to make the declaration of non-advocacy. Herein, however, the complaints made no attempt to

and did not bring petitioners within the conditions for exemption imposed by either Constitution or statute.

The denial of exemption results from refusal to declare non-advocacy, without need of inferring or presuming advocacy therefrom. The refusal need not in reason or logic raise any presumption as to advocacy. The failure to make the declaration which the statute requires as a condition thereof, is fully adequate ground for the denial of the exemption, precisely like the failure to claim the exemption or to show any other qualification therefor.

Refusal to make the declaration might, perhaps, by statute have been made basis for inference of the fact of advocacy. The Legislature may prescribe rules of evidence and declare the effect of evidence as *prima facie* or conclusive as to essential facts. The Legislature, however, did not so formulate the statute herein. It merely prescribed as a condition of exemption that the claimant make a declaration of non-advocacy. The claimant who does not make the declaration has failed to meet the condition and support the burden of establishing his right.

The People of California have declared in Article XX, Section 19 of the Constitution that people or organizations advocating violent overthrow of the government shall not be granted tax exemption. This is a reasonable determination and the Legislature's statute is a reasonable implementation of the constitutional policy.

## III.

**The Terms of the Declaration Required by Section 32 Revenue and Taxation Code Are Neither So Broad Nor So Vague as to Violate the Due Process Clause of the Federal Constitution.**

Petitioners urge that the terms of the declaration required by Section 32 of the Revenue and Taxation Code are "... too vague and indefinite to withstand constitutional due process attack" (Pet'r Consol. Op. Br. p. 6). The brief instances as ambiguous situation of fact "a rabbi during the recent hostilities in Egypt preaching that England was right in her actions"; a Catholic priest's criticism of United States action in a hypothetical situation of United States' seizure of the Vatican; "some Americans advocate the admission of Communist China to the United Nations"; and, "Quakers advocating loving and feeding our enemies in North Korea" (Pet'r Consol. Op. Br. p. 9-10). The answer to these conjured difficulties is that none of them involve the prescribed situation of advocating violent overthrow of government or of "support of a foreign government against the United States . . .". A further conjured difficulty is "What is meant by 'against the United States'? Is a position contrary to, or in criticism of, a policy enunciated by the Secretary of State or the President or Congress 'against the United States'?" (ib. p. 10). The question is not difficult when the full phrase is considered, to-wit, "the support of a foreign government against the United

States" and the situation, viz, "in the event of hostilities".

Advocacy constitutes action and instigation of others, not mere opinion or belief, and the subject advocacy is advocacy of violent overthrow, not advocacy of the right to hold a particular idea or belief or opinion. In the phrase "to advocate" "advocate" has become a word of art. In *Gitlow v. New York*, (1925) 268 U.S. 652, the Court said:

"It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging to action. Advocacy is defined in the Century Dictionary as: '1. The act of pleading for, supporting, or recommending; active espousal.' It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose." (p. 665).

And the California Supreme Court, citing *Gitlow*, adopted this definition of advocacy (Tr. of Record p. 47).

It has before been urged herein that the word "advocate" and its derivatives may cover such things as academic discussion or utterances of abstract doctrine and thus impinge upon constitutionally assured right.

However, as this Court said of a statute very similar to that herein:

"... We should not assume that Congress chose to disregard a constitutional danger zone so clearly marked, or that it used the words 'advocate' and 'teach' in their ordinary dictionary meaning, when they had already been construed as terms of art carrying a special and limited connotation." (*Yates v. United States*, 354 U.S. 298 at p. 319).

Again, in *Dennis v. U. S.*, 341 U.S. 494, this Court said:

"The very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy not discussion." (p. 502).

Article XX, Section 19, when submitted to the voters for adoption, was presented as affecting action. "The argument to the voters stated that it was designed to deny exemption to any person or organization "engaging in such activities". And the Court, in *Board of Education v. Jewett*, 21 Cal. App. 2d 64, points out that "... there is a wide distinction between teaching and advocacy" (p. 72).

It is clear that the word "advocate" is neither so indefinite as to leave petitioners in doubt as to what it means nor so broad as to impinge upon their constitutional right to freedom of thought and peaceful discussion.



Similarly, no valid objection may be made that the term "... other unlawful means ..." as used in the declaration is vague. Earlier cases before this Court have involved statutes containing language in terms very similar to that in our declaration relating to advocacy and overthrow of government. The Court has approved of statutes with similar language which was claimed to be vague. *Adler v. Board of Education*, (1952) 342 U.S. 485 ("... any unlawful means ..." at page 488); *Garner v. Board of Public Works*, (1951) 341 U.S. 716 ("... other unlawful means ..." at page 718); *American Communications Assn., CIO v. Douds*, (1950) 339 U.S. 382 ("... any illegal or unconstitutional methods" at page 386); *Whitney v. California*, (1927) 274 U.S. 357 ("... unlawful methods of terrorism ..." at page 360); and, *Gitlow v. New York*, (1925) 268 U.S. 652 ("... unlawful means"). In these cases the language of the statute was attacked for vagueness. In each case this Court upheld the statute. We submit that the statutory language of our declaration is no more vague nor any more broad than the language so upheld.

Certainly the phrase "unlawful means" does not concern any area of action which petitioners may claim is constitutionally inviolate. The California Supreme Court has dealt with analogous terms and dissipated any indefiniteness that may have existed. *People v. Steelik*, (1927) 187 Cal. 361, 203 Pac. 78, involved the phrases "unlawful acts of force and violence" and

"unlawful methods of terrorism" used in a statute. The Court said the statute

"... does not undertake to define the various acts, the advocacy of which is punishable under the statute. . . . We must look to the general law of the state to determine what are 'unlawful acts of force and violence,' and what are 'unlawful methods of terrorism'. . . . These wrongful acts, most of them already punishable by the criminal law, are denounced by the statute and made felonious when done, or advocated as a means of political or industrial change . . ." (p. 373; 203 Pac. p. 83.)

Petitioners object that the phrase "... support of a foreign Government against the United States in the event of hostilities . . ." is "a totally new concept" (Pet'r Consol. Op. Br. p. 17). We may concede that the phrase has not been used in the loyalty cases which have come before this Court. The fact, however, that terms have not been previously subjected to legal scrutiny does not make them, therefore, indefinite. The indefiniteness test does not require that only shopworn phrases may be used in statutes. Rather, the test is whether the language challenged "... conveys sufficiently definite warning as to the proscribed conduct *when measured by common understanding and practices*. The Constitution requires no more." (*United States v. Petrillo*, (1947) 332 U.S. 1 at page 8.) (Emphasis supplied.) We submit that the language used in the declaration meets this test.

Although the precise phrase may not heretofore have been challenged in this Court, similar language was challenged in *Gorin v. United States*, (1941) 312 U.S. 19, which involved the Espionage Act which prohibited obtaining information "related to" and "connected to" national defense with intent or reason to believe it was to be "used to the injury of the United States or to the advantage of any foreign nation." Held, that the provisions were not unconstitutionally vague or indefinite, the Court saying:

"But we find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law. . . . The language employed appears sufficiently definite to appraise the public of prohibited activities and is consonant with due process." (p. 28).

It is not necessary to go into every possible contrived ambiguity even if this were, as petitioners claim, ". . . in the area of religious belief and conscience . . .", in view of the strong presumption that the State court, in applying the statute, will avoid an unconstitutional application. Because of this presumption, where a constitutional construction may be given to a statute, this Court itself will so construe it. (*For v. Washington*, (1915) 236 U.S. 273, 277; *Knights Templar's Indemnity Co. v. Jarman*, (1902) 187 U.S. 197, 205; *Presser v. Illinois*, (1886) 116 U.S. 252, 269.) This is especially true in the case at bar where it does

not appear from the record or the opinion below that overbreadth was argued so that the California court might define the limits of the statute.

This doctrine of construction will be applied to state statutes even after the state court has had an opportunity to limit the scope of the statute and has not fully done so. This was the situation in *Garner v. Board of Public Works*, (1951) 341 U.S. 716, a case which required much more flexibility of interpretation than the cases at bar. This Court there read scienter into the statute on these grounds, saying:

"We have no reason to suppose that the oath is or will be construed by the City of Los Angeles or by California courts as affecting (activities allegedly within the protection of the Constitution). . . . We assume that scienter is implicit in each clause of the oath. As the city has done nothing to negative this interpretation, we take for granted that the ordinance will be so read to avoid raising difficult constitutional problems which any other application would presents . . .

"The judgment . . . is affirmed on the basis of the interpretation of the ordinance which we have felt justified in assuming." (p. 724).

This Court need not take as great a step in the cases at bar as it was willing to take in the *Garner* case. And we submit that the California court here merits faith equal to that accorded it in 1951. Now, as before, the same grounds exist to believe that the words of this

declaration will be so construed as to avoid raising constitutional problems. For this, and for the other reasons above stated, the declaration requirement should be held valid.

#### IV.

**Entirely Sound Was the California Supreme Court Determination That the Exception of Householders From the Requirement to Make the Declaration of Non-Advocacy Did Not Constitute Denial of Equal Protection.**

Section 32 excepts householders from the requirement of a declaration of non-advocacy. Its provision is that "any statement, return or other document in which is claimed any exemption other than the householder's exemption . . . shall contain a declaration . . ." of non-advocacy. Householders, thus, are not within the provision of Section 32, both because expressly excepted therefrom and also because they need not claim exemption. Unlike churches and orphanages, colleges, veterans and welfare organizations which must each year claim their exemption or for failure to do so waive it, the householder need not claim.

Such exception from the declaration requirement, like the excuse from the requirement to claim the exemption, does not constitute an invalid classification or involve want of equal protection. The different treatment is clearly based on valid classification. The test of a valid classification is that "the classification



may not be arbitrary and must rest upon real differences . . .” (*Northwestern Mutual Life Ins. Co. v. Wisconsin*, (1918) 247 U.S. 132 at 139).

The power of the states to classify for the purpose of legislation is of wide range and flexibility (*Williamson v. Lee Optical*, (1955) 348 U.S. 483; *Continental Baking Co. v. Woodring*, (1932) 286 U.S. 352); and “the power to make distinctions exists with full vigor in the field of taxation . . .” (*New York Rapid Transit Corp. v. New York*, (1938) 303 U.S. 573 at 578). In an opinion upholding an unequal tax on stores (the tax per store was graduated according to the number of stores under the same management), Mr. Justice Roberts stated:

“The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the States. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings or occupations.” (*State Board of Tax Comm’rs. v. Jackson*, (1931) 283 U.S. 527 at page 537.)

A State may classify for purposes of taxation at different rates, (*Puget Sound Power & Light Co. v. Seattle*, (1934) 291 U.S. 619; *Heisler v. Thomas Colliery Co.*, (1922) 260 U.S. 245); for taxing some sub-

jects and granting exemptions to others (*Bell's Gap R. R. Co. v. Pennsylvania*, (1890) 134 U.S. 232); and, therefore, for granting exemptions to different groups at different rates or in different amounts. Our cases fall within the latter category, in that petitioners and others in their class must make full claim for exemption while the householder's exemption is limited to claim to and exemption of only \$100 of assessed personal property (Cal. Const. Art. XIII, §1½ and §10½). This classification and recognized difference in tax treatment, has stood since 1904.

The same classification has long existed in the State as between the procedures required of members of the different classes in order to qualify for an exemption. In 1903 the Legislature enacted Section 3611 of the Political Code to require religious institutions claiming exemption to file an affidavit and to declare use of the property "solely and exclusively for religious worship". There is no such requirement as to the \$100 householder's personal property exemption (Tr. of Record p. 43). Petitioners have never complained of this unequal treatment, nor do they now.

"[A] distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it . . ." (*Rast v. Van Deman & Lewis Co.*, (1916) 240 U.S. 342 at p. 357.)

Administrative convenience and efficiency is one of the accepted grounds of classification (*Williamson*

*v. Lee Optical, supra; Winona & St. Peter Land Co. v. Minnesota*, (1895) 159 U.S. 526). Self-evident are some of the administrative reasons for the state's determination of the desirability of this classification, e.g., the far greater number of householders' exemptions than exemptions of other classes, and the difficulty of processing and enforcing here on an individual basis the requirements applicable to other groups. As a practical matter, the Legislature can well conclude it would cost more to process declarations from small householders with no more than \$100 of assessable property than to grant exemption. The difference between the classes created by the Legislature is illustrated by the assessments herein of \$94,320 and \$6,420 (Tr. of Record p. 4, l. 2) as compared with \$100 in the case of an applicant for the householder's exemption. Such administrative considerations constitute a reasonable ground for the classification. The distinction is not arbitrary; it is not a denial of equal protection of the laws.

## V.

**The Determination of the California Supreme Court Was Sound That There Was No Violation of the First and Fourteenth Amendment Rights Such as to Render Unconstitutional the Statute and Declaration Requirement.**

- 1. Neither California Constitution Article XX, Sec. 19 Nor California Revenue & Taxation Code Sec. 32 Infringes on Freedom of Religion.**

Traditionally, the states have made constitutional provision for the exemption of property used for religious purposes. The ground advanced to justify such exemption is that the exempt property performs a public function. Such ground without qualification is not adequate to justify the exemption in the face of the provision of the Federal Constitution that "Congress shall make no law respecting an establishment of religion . . ." The principle of separation of church and state renders it clear that an exemption may not be granted for *religious* reasons and that the state can grant exemptions to churches only on the ground of the church's *non-religious* benefit to the community. It necessarily follows that the state may deny exemption to churches on non-religious grounds. The fact of denial of exemption or the requirement by the statute of a declaration does not of itself raise any problem of restraint on or violate freedom of religion under the First and Fourteenth Amendments.

Neither violent overthrow of government nor war-time support of the enemy nor advocacy thereof constitute religion; but even if it did, they yet are not such religion as is assured constitutional freedom.

We submit that the proscribed advocacies are not religion. True, in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, this Court held invalid on religious grounds a resolution requiring a salute of the flag, as applied to Jehovah's Witnesses. The Witnesses' justification for their refusal to comply was that the flag was a "graven image" and that saluting the flag would violate the Bible command of Exodus 20:4, 5. Herein petitioners can assert no such claim as ground for refusing to make the declaration. The very nature of the declaration itself distinguishes it from the flag salute in the *Barnette* case. As the California court herein commented "Since this oath is 'obviously not a test of religious opinion' the plaintiff is not excused from making it any more than any other taxpayer" (Tr. of Record, p. 50); and as further pointed out by the Court, petitioners' principles do not indeed preclude oaths. They have already made sworn affidavits in their tax returns and in filing the complaints instituting the present actions. Petitioners declare that "the principles, moral and religious, of the First Unitarian Church of Los Angeles compel it; its members, officers and minister, as a matter of deepest conscience, belief and conviction to deny power in the State to compel acceptance by it or any other church of this or any other oath of coerced affirmation



as to church doctrine, advocacy or beliefs" (Pet'r Consol. Op. Br. p. 5). These "principles" specify and concern only affirmation as to "church doctrine, advocacy or beliefs". The proscribed advocacies as to overthrow of government and war support of the enemy certainly cannot be their church doctrine or belief or religion. Even if the proscribed advocacies were religion, not every religious practice thereby gains protection under the Federal Constitution. This limitation is clear and has long been recognized and declared by this Court. The experiences of the Mormon Church and its practice of polygamy are a case in point. This Court in upholding the oath requirement describing polygamy as a pernicious crime, said that "to call its . . . advocacy a tenet of religion is to offend the common sense of mankind." (*Davis v. Beason*, (1890) 133 U.S. 333 at 342.) And in *Late Corporation of Church of Jesus Christ of Latter Day Saints v. United States*, (1890) 136 U.S. 1, modified (1891) 140 U.S. 665, (1893) 150 U.S. 145, the Court affirmed the taking by the United States of property of the Mormon Church and the application of it to other charitable purposes under the *cy pres* doctrine on the grounds that in view of its advocacy of polygamy, the Mormon Church was no longer fulfilling its charitable purposes. Referring to polygamy the Court said:

"One pretence for this obstinate course is, that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and,

therefore, under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea. No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking did not make it so. The practice of suttee by the Hindu widow, may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority." (136 U.S. 49, 50.)

And see, *Cleveland v. United States*, (1946) 329 U.S. 14.

The similarity between the *Mormon* cases and the instant cases is clear. Can the advocacy of violent overthrow of the government or of war-time support of a foreign government against the United States be any more immune from state regulation on the ground of religious belief than the practice of polygamy? Polygamy was made a crime by statute; advocacy of violent overthrow of the government is made a crime by the Smith Act, and support of a foreign government against the United States in the event of hostilities is treason (U. S. Const. Art. III, §3, cl. 1; 62 Stats. 807 (1948) 18 U.S.C. §2381.) Surely it cannot be argued that advocacy of treason can claim protection as religious practice. The declaration does not

deal with any religious practice within the protection of the Fourteenth Amendment.

The religious issue and the issue of separation of Church and State are false issues herein. The question involved is not any question of conscience, or of opinion, or of belief, either religious or other belief, or of divided loyalty as between church and state, or any issue of a religious test oath. It is merest chance that these particular exemption claimants and/or advocates happen to be church organizations.

Petitioners' brief complains that the subject requirement proscribes advocacy and thereby has "... invaded the sphere of the intellect and spirit" (Pet'r Consol. Op. Br. p. 7); and "... requires the church to give up its right of moral judgment ..." (ib. p. 19), and to "forswear its right to moral judgment ..." (pp. 28-29). Petitioners seriously ask "Can the church be forced to surrender its moral convictions to the state ... ?" (ib. p. 28). Petitioners urge that it is "an important role of the church to criticize ... actions of the government" (ib. p. 20) and object that under the subject provisions "... religion has not been preserved from censorship and coercion ... in ... matters of the spirit ..." (ib. p. 20); and petitioners invoke the principle that "courts cannot sit in judgment on the verity of religious faith" (ib. p. 22). Petitioners even go to the length of submitting their contention as a truism and beyond question. Their measured declaration is the proposition, "that it is a

religious tenet cannot be gainsaid" (ib. p. 23). Thoroughly sound is the answer by the California court herein:

"The plaintiff is affected not because it is a religious organization, but because it is a taxpayer favored in the law by an exemption for which it has refused to qualify. The plaintiff has failed to point out what tenet or doctrine of its faith is infringed upon by compelling it to qualify for the exemption." (Tr. of Record, p. 48).

Petitioners' brief and the American Civil Liberties Union Amicus Curiae brief quote the ringing declarations and roll the sonorous phrases of the great decisions of this Court. Their spirit and language are inspiring. The petition quotes Mr. Justice Frankfurter's language in the *Barnette* case as declaring assurance that:

"If there is one fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, or force citizens to confess by word or act their faith therein." (ib. p. 23).

Justice Frankfurter's ringing apostrophe is quite inapplicable here. Advocacy of violent overthrow of government or of war-time support of the country's enemy is outside the bounds of what is merely not "orthodox". "Not orthodox" is certainly soft impeachment. So minimizing such conduct does not justify it.

Petitioners and *amici curiae*, we submit, cannot transmute the proscribed advocacies or force and violence into religion or equate them with religion, even if in petitioners' or *amici's* concept of things they were religion. Proscription against their exercise would constitute no unconstitutional limitation upon religious practice, and petitioners and *amici* yet could not claim constitutional protection for their exercise.

The provisions of the California Constitution do not concern petitioners' beliefs or principles or tenets. Quite extravagant is petitioners' representation that "the oath . . . has to do with what the church advocates, or rather what the church does not advocate" (Pet'r Consol. Op. Br. p. 25). To the contrary, the oath does not concern advocacy in general or *in vacuo*. It concerns no other advocacy than the two classes of advocacy specified. The church, or any other exemption claimant, need not abstain from all advocacy—only from the proscribed advocacies. Petitioners are not confronted with the alternative of foregoing permitted advocacies. Quite unwarranted is the purported dilemma and the solution which petitioners contrive, to-wit, "the safest thing to do is not to advocate at all" (ib. p. 12).

The Civil Liberties Union brief charges that "no distinction is drawn in the California Constitution or statute between advocacy of abstract doctrine and advocacy directed at promoting unlawful action" (p. 10). True, "no distinction is drawn," but because "abstract



doctrine" is not at all covered by either the Constitution or statutory provision. "Abstract doctrine" is not their subject at all. Instead, only advocacy of violent overthrow and of war-time support of the enemy. The provisions no more concern "abstract doctrine" than they consider most other things, e.g., murder, or larceny, or income tax evasion, or illegal entry, or the price of wheat.

Petitioners' brief objects to the limitation placed upon the proscribed advocacies, by soliloquy that "Historically, concepts of loyalty shift and change as the forces pulling and tugging within the state lose or gain strength" (Pet'r Consol. Op. Br. p. 28). No "concept of loyalty," however, would permit advocacy of violent overthrow of one's country or of war support to the enemy.

American Civil Liberties Union objects to the declaration requirement as a "political loyalty test" (p. 15). The Declaration, however, constitutes no pledge of loyalty or agreement nor of support of the government. It does not require allegiance and the bended knee, but instead, would restrain the upraised or brandished sword. The Civil Liberties Union analogizes the relation of the citizen to his country and the limitation against his advocacy of its violent overthrow to the situation of the American Colonies and Great Britain in 1776 and quotes from the Declaration of Independence (pp. 17, 18). The government from which the American Colonies declared their independence

was not their government or a government in which they had any voice or representation. That was the very reason for the Declaration, viz, that the foreign government of Great Britain had the "design to reduce them under absolute despotism" and because of "having in direct object the establishment of an absolute tyranny". The American Colonies had the power and the right to be free from a foreign and tyrannous government superimposed on them and in which they had no voice or representation. British government was imposed from abroad. It was not a government "... deriving their just powers from the consent of the governed." The governed had not consented to and did not establish the government—had no representation in or voice or control over it. They could not change it. No method of change was available to them.

Also, of course, the Declaration of Independence did not declare the right to overthrow, and the American Colonies were not concerned with the overthrow or the existence of the Government of Great Britain. They sought merely to free themselves from Great Britain and British rule.

American Civil Liberties Union seeks to interpret the declaration requirement as attempt by California to prevent criticism of public officers in their conduct of the public business. It charges that "... the real purpose of the challenged California laws is to prevent or abridge free expression of opinions which are critical of the agencies and operations of the State and

Federal governments, particularly in respect to their possible misdoings" (Am. Cur. Br. p. 16). Not so, at all. The question is not as to the right to hold and express moral judgment, or to object to or to criticize bad conduct in public office. All would agree that in a democracy, if the official conduct of those in public office is venal or corrupt or morally wrong, the church and the citizens are free to say so and to protest.

A question might be what one may do if he disapproves of the conduct of officials or the form of government, what he may do as a result of his judgment or opinion, and how he may act on it. The method for elimination of persons in office is provided. Incumbents can be removed or replaced. Change in the structure of government may be made, but only within the law. In a democracy the critic is not free to "overthrow the government by force or violence or other unlawful means." Reforms have been made and changes in structure has been frequent. Our Federal Constitution has twenty-two amendments. The processes of law include even the initiative and referendum, and impeachment and recall. Overthrow of government, or even forceful or violent change in government, is proscribed. The subject provisions repress the subject advocacies for the very reason that they are advocacy of an unlawful end by unlawful means.

We find similar basic departure from and misconception of the issue herein by Philadelphia Yearly

Meeting of Friends. Again, almost entire failure to consider or discuss the true issues involved. The phrases "freedom to seek the truth and the freedom to act upon the truth" head its "Argument" (p. 4). This brief again quotes from the great decisions such ringing declarations as that from the *Ballard* case: "With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted . . ." (p. 5). The brief quotes from a "Report to the Friends' World Conference" the need to ". . . seize the ethical and spiritual significance of the whole situation before us, and deal with it from above the storm and controversy and propaganda of the moment" (pp. 5-6). The brief talks about a requirement for ". . . a disavowal of belief" (p. 6) and of apprehension that ". . . non-treasonable belief and actions . . . might be foreclosed by such a declaration . . ." (p. 6). Similarly, American Civil Liberties Union refers to "religious principles" and "moral judgment" (p. 17), and most strangely appeals to the Sermon on the Mount to justify the proscribed advocacy of unlawful violent overthrow of government and of war-time support of the enemy (p. 20). In order to practice the teachings of the Sermon on the Mount must not the church, or anyone else, forbear from advocating forceful and unlawful overthrow of government? To merit the blessings assured to peacemakers, must they not for-

bear from advocacy of war-time support of our country's enemy?

The Philadelphia Friends divert attention to "beliefs for which man is accountable only to God" (p. 7); to "the supremacy of conscience" and the "philosophy which sets the state above the moral law" (p. 7), with appeal to a "higher authority"; the "authority of God and conscience" (p. 8); to "the dignity and worth of the individual" (p. 8) and the principle of "absolute liberty of conscience" (p. 10), and instance the "time when the Stuart monarchs sought to prescribe for Englishment what should be orthodox in religion . . ." (p. 9), with test oaths for "enforcing conformity to the state's religion" (p. 10).

If we return to the question involved, the subject is the provision of the California Constitution and statute concerning the advocacy of overthrow of government by force and violence and the advocacy of support of a foreign government against the United States in the event of hostilities. Such advocacy cannot be called religious speech or religious doctrine or belief. To so assert is merely to pervert the meaning of language. It represents almost Humpty Dumpty's attitude with regard to the meaning of words, that they mean whatever you want them to mean. In Lewis Carroll's child story-book, Alice encounters Humpty Dumpty in Wonderland and they talk together. In the course of their conversation Humpty Dumpty uses the word "glory" and says that "glory" means "a nice



knock-down argument." To the puzzled Alice he easily justifies his strange meaning for the word. Says he, a word "means just what I choose it to mean." As between the speaker and the word which he uses, Humpty Dumpty explains, "the question is which is to be master—that's all."\* Just so, petitioners and *amici curiae* here assume to be "master" of the words "religion," "religious principle" and "moral conviction," and moral law, liberty of conscience, and "freedom of thought," "God and conscience," and "higher authority." Summoning up such words and the basic principles and fundamental rights which they stand for and connote, petitioners present them quite as though they constituted here "a nice knock-down argument." When we complain to our opponents, as did Alice to Humpty Dumpty, "I don't know what you mean" by your so-called "religious principle" and "moral judgment," etc., they reply, as did Humpty Dumpty, "Of course, you don't—till I tell you."

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\*In Alice's talk with Humpty Dumpty, she said she preferred birthday presents to "unbirthday presents". Humpty Dumpty preferred "unbirthday" presents, for, said he, there is only one birthday in a year but 364 "unbirthdays", and he then pointed his all-conclusive argument: "And only one for birthday presents, you know. There's glory for you!"

"I don't know what you mean by 'glory'," Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there's a nice knock-down argument for you!'"

"But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

("Alice in Wonderland and Through Looking-Glass." Chap. VI, "Humpty Dumpty.")

Petitioners' brief closes its excursion into religious principle and history with the suggestion that "enough has been shown, we think, to demonstrate that in the light of history and tradition, the requirement of the oath here does indeed impinge upon the freedom of religion and the separation of church and state"-(Pet'r Consol. Op. Br. pp. 27-28). Petitioners' major premise is valid enough, that religion must be permitted and must be free. The minor premise, however, is false, that force and violence to overthrow government are religion or have the rights of religion. Also, force or violence to accomplish such overthrow and such support are not the means or instruments of religion.

There is nothing of religion about the unlawful and violent overthrow of government or the advocacy thereof. The Constitution, form, administration and support of government are matter of government, and not of religion. The realm and scope of the two are entirely distinct and separate.

*Advocacy of violent overthrow of government is not religion merely because it is advocacy by a church.* The First Amendment assurance of religion and the free exercise thereof is, of course, not assurance to religious institutions or churches as such. When an activity, whether by a church or by any other, is not religion it does not fall within the provision.

Petitioners contend that no oath or declaration can be required from a church no matter what may be the oath or declaration. The brief says:

"It is not the content of the oath alone, but the coercion of Church by State which ~~truly~~ penetrates the wall and establishes the Church as subject to the will of the State." (Pet'r Consol. Op. Br. p. 28)

More extremely petitioners say "it is as churches that petitioners are affected here, a fact which cannot be overlooked and in the light of which the oath must be judged" (ib. p. 24). Petitioners' argument seems seriously to be that to require an oath from a church would violate assurances given to religion, independent of the content of the oath. They represent that "the oath, though couched in political terms, is religious in its effect on the church for it forces the church to acknowledge that the state has the power to compel the state to confess its advocacy" (ib. p. 24). Petitioners cannot indeed urge that whatever the church does is religious or that whatever the church touches becomes worship. The advocate may indeed be religious, but advocacy is religious only on matters religious. When the church's advocacy becomes advocacy of non-religious matters, it is no longer religious advocacy or religion. Obviously, advocacy by a church need not be religious, not advocacy of polygamy, nor advocacy of the cause of a particular candidate or party in a political election; not advocacy of violent overthrow of government or of war-time support of the enemy. Assertion, however positive or loud, that such advocacy is worship or religion cannot constitute it such.

The petition asks "Can the church be forced to surrender its moral convictions . . . ?" (ib. p. 28). What are these "convictions"? Humpty Dumpty must tell us what he means. Are they indeed "moral convictions"? Quite mistaken is petitioners' idea that they may keep the answer secret and that we must accept their mere *ipse dixit*. Utterly mistaken would seem the brief's dubious proposition that "it is not the content of the oath alone but the coercion of church by state which truly penetrates the wall and establishes the church as subject to the will of the state" (ib. p. 28).

It is beside the point to object that force is futile within the realm of conscience and the mind. The "futility" or effectiveness of the constitutional provision, moreover, is another question. That is to say, the question of the policy and the wisdom of their adoption were for the determination of the People adopting the constitutional provision and for their Legislature in enacting the statute. Nevertheless, it is only "*within the realm of conscience and the mind*" that force is futile. Force is not "futile" to protect property and rights, or to prevent or remedy wrong. Force against conscience may accomplish nothing, but force may preserve and remedy and may achieve worthy ends. Might or force may be called upon to protect the right—right need not be helpless, weak or ineffectual. In our Western philosophy (whatever may be the reasoning of some Eastern philosophies) force, itself, is neither right nor wrong. Force is outside the realm of ethics or religion.

Petitioners' argument and error are the idea that advocacy of force or violence and the overthrow of government may become religion and may concern the church and religious worship merely because advocacy by a church. Force and violence continue force and violence. Overthrow of government, even a change of government, whether by force and violence or in authorized constitutional manner and by established and accepted political methods, continue to be secular and not matter of religion; and advocacy of overthrow or of change is not religious advocacy. This is illustrated by the oath required of the public employee by the Levering Act, *inter alia*, that he does not advocate the forcible overthrow of government. This oath, the state court has said is "obviously not a test of religious opinion . . ." (*Pockman v. Leonard*, 39 Cal. 2d 676, 686).

Thus, petitioners and their amici earnestly urge fundamentals of principle and of rights which all accept and on which all agree. All of this utterly ignores the fact and the subject of discussion. It completely ignores the question presented. What was it that the churches were required to declare, and what was it they refused to declare? Merely, that they do not advocate the violent overthrow of our country or war-time support of her enemy. Our question yet calls for answer: How is advocating the overthrow of government within the area of religion or of worship? It constitutes palpable misreading of the limitation



against the proscribed advocacies to assert that it violates religious doctrine or belief. "As the California Supreme Court soundly declared herein, "This oath is obviously not a test oath of religious opinion" (quoted Pet'r Consol. Op. Br. p. 21; Tr. of Rec. p. 50).

**2. Neither California Constitution, Article XX, Section 19, Nor California Revenue and Taxation Code, Section 32, Abridge Petitioners' Right of Free Speech Guaranteed by the Fourteenth Amendment.**

Undoubtedly the subject provisions of Constitution and statute do to a degree infringe the liberty to speak of those churches which advocate the proscribed type of action. However, on many occasions this Court has declared that not every infringement of the liberty to speak is unconstitutional. In his concurring opinion in *Dennis v. United States*, 341 U.S. 494, Justice Frankfurter has classified the cases in which conflicts between speech and competing interests have been resolved. (341 U.S., pp. 529-539.) In many of these cases the scale has tipped in favor of the interest competing with speech, and the restriction on speech has been upheld. The problem here is to ascertain, define and delineate the conflicting interests of the individual and of the State, and to weigh and evaluate those interests.

Of course involved is the interest of maintaining free speech. The interest of the Nation and the States

in preserving freedom of speech and the benefits thereof have often been considered by this Court and need not be here reviewed. The State interest sought to be promoted and forwarded by the church exemption has not recently had detailed attention by this Court.

However, many State courts have had occasion to examine the particulars of the relation between religion and religious practice and its secular effects on the law and the morals and mores of a community. For example, the California Supreme Court in this case below said:

“There are additional interests with which the state is concerned and which it is attempting to promote by granting exemptions from taxation. Included is the interest of the state in maintaining the loyalty of its people and thus safeguarding against its violent overthrow by internal or external forces. This legitimate objective is sought to be accomplished by placing in a favored economic position, and thus to promote their well being and sphere of influence, those particular persons and groups of individuals who are capable of formulating policies relating to good morals and respect for the law. It has been said that when church properties are exempted from taxation ‘it must be because, apart from religious considerations, churches are regarded as institutions established to inculcate principles of sound morality, leading citizens to a more ready obedience to the laws.’ ” (Tr. of Rec. p. 51-52).

In *State vs. Woodruff*, 152 Fla. 84, 13 So. 2nd, 705, the Florida Supreme Court said:

"Every system of law rests on a corresponding system of ethics that directs its course. . . . We are committed to a free exercise of religious opinion but since our system of law rests on Christian ethics one would not be permitted to set up a harem and practice polygamy in Florida under the guise of religious freedom because polygamy is contrary to approved moral standards. If our law were predicated on Mohammedan ethics, the converse would be true. If it were predicated on pagan ethics, I could sell my child as a slave and if predicated on still another system and I belonged to the sect known as Dukhoborrs, I would be permitted to traverse the highways nude under the guise of religion, but not so in our country because our system of moral teaching raises a different standard that the law must conform to.

"The reason the Bill of Rights immunized religion and the press from governmental interference is not far to seek. . . . The authors of the Bill of Rights descended from ancestors who had been persecuted and condemned to rot in jail for indulging religious and secular beliefs. It took them a thousand years to wrest these liberty from arbitrary kings, . . . But the church and the press were not liberated from governmental interference carte blanche; to their liberty was attached an obligation to the public on parity with the freedom given.

"... Our whole theory of democratic policy as well as law rests on like moral standards and the church is a medium by which they are refined. . . . Herein lies the obligation of the church and the press to point each generation the way to these virtues and failing in this, they fail in their debt to the Bill of Rights." (pp. 705-706.)

In *State v. Mockus*, 120 Me. 84, 113 Atl. 34, the Supreme Court of Maine recognized the strong influence of religion on our basic political institutions:

"... from the dawn of civilization, the religion of a country is a most important factor in determining its form of government, and that stability of government in no small measure depends upon the reverence and respect which a nation maintains toward its prevalent religion . . . religion teaches acknowledgement of the existence, presence, knowledge, and power of God, as related to human beings in all walks of life; this religion teaches dependence upon God; this religion teaches reverence toward God and respect for Holy Scripture. Even as we are writing these words the man who is about to assume the duties of the high and responsible station of President of these United States, following the unbroken custom of more than a century, and to the end that his official vow may be more impressive and binding, reverently says, 'So help me God,' and then pausing, with equal reverence, salutes the Holy Scripture by a kiss. Congress and State Legislatures open their sessions with prayer addressed to the God of the Christian religion. Judicial tribunals,

anxious to discover and apply the truth, the whole truth, and nothing but the truth, require those who are to give testimony in courts of justice to be sworn by an oath which recognizes deity. Thus it will be seen that there is acknowledgement of God in each coordinate branch of government." (113 Atl., 42.)

The influence and place of religion in the culture of our nation is stated by this Court in *Church of the Holy Trinity v. United States*, 143 U.S. 457:

"But beyond all these matters no purpose of action against religion can be imputed to any legislation, State or Nation, because this is a religious people. (p. 465.) If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, 'In the name of God, amen;' . . . and the closing of courts, Legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town, and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and



many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation." (p. 471).

Alexis de Tocqueville in his *Democracy in America* (The Henry Reeve Text, New York, 1951, vol. 1, ch. 17) describes religion as the first of America's political institutions, and says,

"... Religion is much more necessary in the republic . . . than in the monarchy . . . ; it is more needed in democratic republics than in any others. *How is it possible that society should escape destruction if the moral tie is not strengthened as the political tie is relaxed?* . . ." (Emphasis added.)

In 1908 James Barr Ames, Dean of the Harvard Law School, in a lecture on "Law and Morals" (reprinted in *Jurisprudence in Action*, Baker, Voorhis & Co., at pp. 5-26) sketched the development of the English common law to show the significant influence of moral concepts in the growth and development of the law, particularly in the field of equity. In sum, religion and religious practice profoundly influence, even control, the mores and ethics of a society, matters of deep concern to the state.

In 1952 the People of California considered that those who advocate the violent and lawless overthrow of government or war-time support of the enemy have an influence in the community directly contrary to

what they seek to promote by the grant of church exemption. And the People concluded that such advocates do not afford the *quid pro quo* for which the exemption is granted, and that the exemption should be withdrawn. The reason for withdrawal was not a "clear and present danger" or any danger of overthrow of government or of attempted overthrow, but rather to make effective the exemption inducement and reward and to withdraw the subsidy from those who do not forward the purpose of the exemption.

The present cases involve a conflict between the interest of the state to improve and raise the moral and ethical standards of the people on the one hand, and on the other hand the interest to preserve the right of free speech and communication. The moral and ethical standards of the people are undeniably a substantial interest of the state; and on the other hand, advocacy of violent overthrow of government has some claim to protection as speech, and merely because it is speech. Its claim, however, is not substantial. Its value, if any, is the stimulus it provides for rebuttal (see Mr. Justice Frankfurter concurring opinion in *Dennis v. United States*, 341 U.S. 494, 549). As there declared,

"... on any scale of values which we have hitherto recognized, speech of this sort ranks low."

The question is whether the interest in preserving free speech and communication is so overwhelming that the

interest in maintaining and raising the moral and ethical standards of the people must be subordinate to and must bow before and be defeated by the type of speech here considered.

Answer to the question whether the right of free speech over-balances the interest of the state in maintaining and advancing the moral and ethical standards of its people requires a measuring or weighing of the opposing values. Such value judgment was properly to be made and was made by the People of California in enacting the subject provision of their Constitution; and it is the People of California who are most concerned and will most feel the effects of their decision. This Court should not here assume super legislative power where the people of the state have acted reasonably, even if the Court were possibly to feel that it might have acted differently had the choice been left to it. Certainly, it will be conceded that the interest of the state in the morals and ethics of its people is as important as in the free flow of commerce (*American Communications Assn. v. Dowds*, 339 U.S. 382); or, as in the use by the people of the public parks and streets (*Niemotko v. Maryland*, 340 U.S. 268; or, as in the trade policies of a state (*Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490); or, as in the quality of the literature being disseminated to the public (*Kingsley Books, Inc. v. Brown* 354 U.S. 436; *Roth v. United States*, 354 U.S. 476).

Petitioners cite (Pet'r Consol. Op. Br., p. 15) the statement of dissenting Justice Traynor of the California Supreme Court that

"The issue thus narrows to whether a state can properly restrain free speech in the interest of promoting what appears to be eminently right thinking. A State with such power becomes a monitor of thought to determine what is and what is not right thinking (R. F. 63)."

This statement, perhaps, oversimplifies the issue. We submit it has not been an unreasonable determination by the People that a democratic or republican form of government can thrive or can best exist within a particular type of ethical and cultural climate. Certainly anyone would concede that a democracy could not exist if the majority of its citizens had anarchistic beliefs which they intended to put into practice at the opportune moment. Too, it would seem that conditions of real personal liberty could long survive only if most members of the community believe that others have rights that must be respected. The dispositions of a people are in great part determined by their cultural and ethical environment. Criminal statutes implicitly recognize the various aspects of the social culture, e.g., the right to own and possess property free from disturbance by others. But the protection of criminal laws to our government, our institutions and our culture is of a negative type. May not the state employ, as well, positive measures to strengthen the institu-

tions upon which our freedoms and form of government rest? For this Court to acknowledge the existence of such power in the State would no more make the State a "monitor of thought" than has this Court's recognition of the State's power to tax the instrumentalities of interstate commerce destroyed or substantially impeded interstate commerce.

Petitioners argue (Pet'r Consol. Op. Br. pp. 14-19) that Article XX, Section 19 restricts not only the type of advocacy whose prohibition was upheld in *Dennis v. United States*, *supra*, but also mere theoretical prophecy, discussion of ideas, doctrine, etc. This contention is confuted by examination of the majority opinion. Therein the Court very definitely states:

"In the present case it is apparent that the limitation imposed by section 19 of article XX as a condition of exemption from taxation, is not a limitation on mere belief but is a limitation on action—the advocacy of certain proscribed conduct. What one may merely believe is not prohibited. It is only advocates of the subversive doctrines who are affected. Advocacy constitutes action, and the instigation of action, not mere belief or opinion. (R. F. 47).

And again the California Court said:

"As above noted the advocacy of the conduct prohibited [by Article XX, Section 19] has been made criminal by Congress (Smith Act, 54 Stat. Part I, p. 670 [1940]), and through numerous



statutory provisions by state legislatures it is well established that such advocacy is against local public policy" (R. F. 49).

And yet again:

"The Dennis case involved the validity of the Smith Act which prohibited and made criminal the advocacy of the activities denounced by the people of this state in its Constitution . . . In the present case the constitutional provision is concerned with those who advocate the same prohibited activity" (R. F. 53).

That is to say, the California Supreme Court clearly defines its interpretation of Article XX, Section 19 as that type of advocacy whose prohibition was approved in *Dennis v. United States*, *supra*. Such limitation by the California court of the subject provisions must conclude any attempted doubt as to their meaning. That interpretation will be accepted by and be binding on this Court (*Winters v. New York*, 333 U.S. 507; *Poulos v. New Hampshire*, 345 U.S. 395). Petitioners are limited to the majority opinion to divine the holding of the case.

American Civil Liberties Union argues (Am. Cur. Br. pp. 9-17) that the requirement by Section 32 of a non-subversive declaration constitutes a prior restraint on speech. The term "prior restraint" has to do with censorship, the enjoining of future communication and the like. It involves present control attempted over

future speech (*Near v. Minnesota*, 283 U.S. 697; *Kingsley Books v. Brown*, 354 U.S. 436). The declaration required by Section 32 is not that the declarer will *not in the future* advocate violent overthrow or war-time support, only that he does not *now* so advocate. The oath does not involve future action or utterance or prior restraint.

Nor, as American Civil Liberties Union further argues (*ib.*, p. 15), does Article XX, Section 19, make political loyalty a test for church exemption. A church organization may be wholly disloyal and still qualify for exemption. It may desire and hope for a Soviet type dictatorship. It may be committed to violence toward overthrow of our democracy in favor of dictatorship. It may believe and teach that society would fare better under a monolithic state than under democratic government. None of these would disqualify for tax exemption. The condition for exemption imposed by Article XX, Section 19, as interpreted by the majority of the California Supreme Court, is that the church do not *advocate* the overthrow of government or *advocate* war-time support of a foreign government against the United States. The test imposed is not pledge of loyalty; not liege support but disavowal of countervailing action; not allegiance and the bended knee but forbearance and sheathing of the upraised sword. The two are utterly different. Judge Learned Hand, in *United States v. Rossler*, 144 Fed. 2d 463, discusses the difference between attitudes of mind and heart and physical acts.

Entirely consistent with obtaining the exemption, churches may continually debate democracy versus dictatorship and their relative merits. They may entertain and discuss any beliefs they wish. But they cannot obtain the church exemption when they take active steps to degrade and tear down the cultural and ethical quality of our people by encouraging them to take up arms and engage in violence against government when the time is ripe. The legitimate and proper purpose of the church exemption would be defeated by granting such organizations the church exemption.

## VI.

**Federal Legislation Has Not So Occupied the Field of Advocacy of Violent Overthrow of Government That the States Now Lack the Power to Deny Tax Exemption to Those Who So Advocate.**

○ Petitioners argue (Pet'r Consol. Op. Br. pp. 41-43) that the federal government has so occupied the field of sedition that the States no longer have the power to enact any manner of legislation on the subject. In this contention petitioners rely primarily on *Pennsylvania v. Nelson*, 350 U.S. 497, where this Court held invalid a Pennsylvania Court conviction, under the Pennsylvania Sedition Act, of sedition against the United States, on the ground that the federal government had fully occupied that field. The pith of petitioners' argument is that

"If the state cannot punish the disapproved advocacy by the exercise of the criminal power, it cannot punish such advocacy by the exercise of the taxing power . . ." (Pet'r Consol. Op. Br., pp. 42-43).

No such principle can be gleaned from the *Nelson* case. This Court was careful to preclude that very implication, saying:

"It should be said at the outset that the decision in this case does not . . . limit the right of the State to protect itself at any time against sabotage or attempted violence of all kinds. Nor does it prevent the State from prosecuting where the *same act* constitutes both a federal offense and a state offense under the police power, as was done in *Fox v. Ohio*, 46 U.S. 410, and *Gilbert v. Minnesota*, 254 U.S. 324, . . . In neither of those cases did the state statutes impinge on federal jurisdiction. In the *Fox* case, the federal offense was counterfeiting. The state offense was defrauding the person to whom the spurious money was passed. In the *Gilbert* case this Court, in upholding the enforcement of a state statute, proscribing conduct which would 'interfere with or discourage the enlistment of men in the military forces of the United States or of the State of Minnesota,' treated it not as an act relating to 'the raising of armies for the national defense, nor to rules or regulations for the government of those under arms [a constitutionally exclusive power].. It [was] simply a local police measure. . . ." (Emphasis added.) 350 U.S., at 500-501.

In that case this Court said expressly that the jurisdiction of the states was superseded only as regards parallel legislation. Article XX, Section 19 and Section 32 do not broadly or universally proscribe advocacy of violent overthrow of government, only in connection with tax exemption. Advocates of this activity, whether churches or others, are not punished or penalized, nor are they taxed more than others who also do not qualify for the church exemption because for one reason or another they also do not serve the ends sought to be effected by the church exemption.

Further, petitioners' argument in this respect is inconsistent with this Court's decisions in *Adler v. Board of Education*, 342 U.S. 485 (which upheld the power of the States to deny employment as a teacher to those who advocate forceful and violent overthrow of government) and in *Garner v. Board of Education*, 341 U.S. 716 (which upheld the power of States and their subdivisions to deny public employment to advocates of violent overthrow of government). The *Nelson* case did not overrule *Adler* and *Garner*; instead both cases were cited with approval within one week of the *Nelson* decision in *Slochower v. Board of Education of N. Y.*, 350 U.S. 551.



## CONCLUSION

We respectfully submit that the petitions should be dismissed and the decisions by the California Supreme Court be affirmed.

Respectfully submitted,

HAROLD W. KENNEDY, County Counsel  
and

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and

Alfred Charles DeFlon, Deputy County  
Counsel,

*Attorneys for Respondents.*

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IN THE  
**SUPREME COURT**  
OF THE  
**United States**  
October Term, 1957

THE FIRST UNITARIAN CHURCH OF LOS  
ANGELES.

*Petitioner,*

vs.

COUNTY OF LOS ANGELES, CITY OF LOS  
ANGELES, H. L. BYRAM, COUNTY OF LOS  
ANGELES TAX COLLECTOR, et al,

*Respondents.*

VALLEY UNITARIAN-UNIVERSALIST  
CHURCH, INC.

*Petitioner,*

vs.

COUNTY OF LOS ANGELES, CALIFORNIA;  
CITY OF LOS ANGELES, CALIFORNIA;  
H. L. BYRAM, COUNTY TAX COLLECTOR,

*Respondents.*

**ANSWER TO AMICUS CURIAE BRIEF OF  
AMERICAN CIVIL LIBERTIES UNION.**

HAROLD W. KENNEDY, County Counsel  
And Gordon Boller

Assistant County Counsel  
And Alfred Charles DeFlon,

Deputy County Counsel  
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IN THE  
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*Respondents.*

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CITY OF LOS ANGELES, CALIFORNIA;  
H. L. BYRAM, COUNTY TAX COLLECTOR,

*Respondents.*

No. 385

**ANSWER TO AMICUS CURIAE BRIEF OF  
AMERICAN CIVIL LIBERTIES UNION.**

Re-reading of the amicus curiae brief of American Civil Liberties Union herein prompts answer to some things said therein and some consideration fuller than we were able to make in respondents' consolidated brief



giving common consideration to petitioners' consolidated opening brief and to the two amicus curiae briefs.

# I.

## **Denial of Exemption Was Not Based on Assumption of Advocacy.**

This proceeding does not involve and petitioners may not validly assert or imply or assume that they do not advocate violent overthrow of our government or war time support of the enemy. On the record the petitioners have not alleged that they do not so advocate. The complaints or either of them instituting the present litigation do not so allege. The fact of non-advocacy was not alleged such as to put it in issue or permit evidence or showing in court or finding by the court or any assumption or conclusion thereon. (Resp. Consol. Br. p. 24.)

Petitioners' assertion of right to exemption is made not under or pursuant to article XX Section 19 but contrary thereto.

The brief indicates the mistaken idea or analysis that the denial of tax exemption was based on an assumption of advocacy because of refusal to subscribe the declaration of non-advocacy. Instead, the denial was based on the failure of the applicants to meet one of the conditions prescribed therefor. The brief states the idea that

“This is not a situation where the tax exemption was denied or revoked because petitioners had been

duly found to be engaged in such advocacy . . . . Here the denial of a tax exemption was based solely on petitioners' refusal to subscribe to a declaration or oath of non-advocacy : . .

"In this process the taxing authorities have arbitrarily *assumed* that petitioners are engaged in such advocacy simply because they refused to subscribe to an oath that they were not doing so." (p. 9).

And in reiteration of the same idea we read on the following page:

"The criteria for exemption is not actual advocacy but the making of a declaration of non-advocacy." (p. 10).

The misconception is dispelled upon slight analysis. If a state has the power to deny exemption to those churches which in fact advocate violent overthrow, and if the use of a declaration is a reasonable means of answering the question of advocacy and of effectuating that power, then obviously exemption is denied not because of the refusal *per se* to declare but because, by the refusal, the property owner fails to bear the burden of showing qualification for the exemption.

The question is not whether the state may deny exemption for refusal to make the declaration; rather, the question is whether the state has the power, in the face of freedom of speech, to deny exemption to an organization which does in fact advocate overthrow. We submit that the State of California does in fact have such power.

## II.

**The Requirement of the Declaration Does Not Abridge Freedom of Speech under the First Amendment** (in supplement of Resp. Consol. Br. p. 54).

On the question of the basis of this power the first consideration is on what grounds exemptions are granted. As already seen (Consol. Op. Br. p. 12) exemptions are granted because the social benefit from the exemption is deemed by the state to equal in value the diminution in tax revenue resulting from the exemption. Where the exemption claimant fails to satisfy the requirements established by the state as a condition of receiving the exemption, it will not be granted, as for example where the property is not used solely for religious worship or is a source of rental income. Cal. Const. Art. XIII, §11½. Thus California has determined that the net value to society of organizations advocating the violent overthrow of the government or the support of a foreign government in the event of hostilities, is not such as to entitle such groups to public funds.

Though this policy has an incidental effect on speech, it is not *ipso facto* void under the First Amendment. It is fundamental that freedom of speech, though sacred, is not absolute. Certain types of speech have been held, by their very nature, not to be the sort which the First Amendment was designed to protect under any circumstances. *Roth v. United States*, 354 U.S. 476 (obscenity); *Beauharnais v. Illinois*, 343

U.S. 250 (group libel); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (" . . . the loud and obscene, the profane, libelous, the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," " . . . offensive, derisive or annoying . . . language." (ib. pp. 569, 572)).

When, however, it is not so obvious that the speech being regulated falls outside the protection of the First Amendment, it is necessary to set forth a formula by which the validity of the regulation may be tested. One such standard involves (1) weighing the public interest to be promoted as against the individual right of free speech and expression.\* The other standard is (2) the "clear and present danger" test. It would appear that the latter may be applied in cases where the restraint on speech is direct, such as is the case with sedition statutes, while the former is applied where, as here, the restraint is an indirect result of some other statutory purpose. In *American Communications Ass'n, CIO v. Douds*, 339 U.S. 382, the Supreme Court held valid the provision of the Taft-Hartley Act, which required a non-Communist affidavit of union officers as a condition precedent to the union's invoking the services of the N.L.R.B. Speaking of that case in the *Dennis* case, this Court said:

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\**Prince v. Massachusetts*, 321 U.S. 158 (1944) indicates that there is no greater protection for one First Amendment freedom than for another, and that the same type of balancing process suggested here is appropriate when there is raised a valid claim of infringement on religion.

"We pointed out that Congress did not intend to punish belief, but rather intended to regulate the conduct of union affairs. We therefore held that any *indirect* sanction on speech which might arise from the oath requirement did not present a proper case for the 'clear and present danger' test; for the regulation was aimed at conduct rather than speech." *Dennis v. United States*, 341 U.S. 494, 507. (Emphasis supplied.)

In the *Douds* case itself the Court had said:

"When particular conduct is regulated in the interest of public order, and the regulation results in an *indirect, conditional, partial* abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." *American Communications Ass'n, CIO v. Douds*, 339 U.S. 382, 399, 94 L. ed. 944. (Emphasis supplied.) *Accord, United States v. Harriss*, 347 U.S. 612 (1954).\*

Further *Douds* said:

"Considering the circumstances surrounding the problem—the deference due the congressional judgment concerning the need for regulation of

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\*Picketing, especially when peaceful, is a means of communication not very unlike speech. Therefore, it is significant to note that the Court has upheld numerous prohibitions of picketing, which prohibitions had been effected because the purpose sought to be achieved by the picketing were against public policy. This was done in the face of First Amendment objections by applying the balance of interests test. *Building Service Employees Int'l Union; Local 262 v. Gazzam*, 339 U.S. 532 (1950); *International Brotherhood of Teamsters, etc., Union, Local 309 v. Hanke*, 339 U.S. 470 (1950); *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).



conduct affecting interstate commerce and the effect of the statute upon rights of speech, assembly and belief—we conclude that §9(h) of the [Labor-Management Act] does not unduly infringe freedoms protected by the First Amendment.” (339 U.S. 382, 411, 412.)

In *United Public Workers (CIO) v. Mitchell*, 330 U.S. 75, this Court, applying a balance of interest test, held that the Hatch Act, which proscribes partisan political activities by employees of the federal government, was valid in the face of First Amendment objections. Speaking of that decision, the Court later said in *Douds*:

“ . . . the rational connection between the prohibitions of the statute and its objects, the limited scope of the abridgement of First Amendment rights, and the large public interest in the efficiency of government service, which Congress had found necessitated the statute, led us to the conclusion that the statute may stand consistently with the First Amendment.” (339 U.S. 382, 405.)

Applying herein the balancing analysis, on one side stands the interest of the state in administering its tax policy, and on the other stands an indirect incursion on Petitioners’ right of free speech. The “large public interest in the efficiency of government service” in the *Mitchell* case, and the “need for regulation of conduct affecting interstate commerce” in the *Douds* case seem direct analogy to the interest of Cal. in determining where tax benefits ought to be be-

stowed. The power of a state to allocate its limited resources is fundamental to its existence. This heavily outweighs any infringement of free speech employed in advocacy of violent overthrow of the government or of war time support of a foreign government.

Furthermore, the possible infringement of First Amendment rights is inherently less where, as here, the person affected has a choice, and the choice is free; that is to say there is no penal liability incurred no matter which choice is made, (unless, of course, the declaration, if made, is false).

Tax exemptions are within the discretion of the state; so is admission to the bar. This Court in *In re Summers*, 325 U.S. 561 gave some indication of how far it would go in allowing the exercise of that discretion. Illinois refused Summers admission to the bar on the ground that, as an advocate of non-violence, he would not and in good conscience could not take the oath to support the state constitution. This Court upheld the state's action despite concession by both parties that non-violence was his valid and honest religious belief, and despite the fact that the odds were almost overwhelming against his ever being called upon to fight to defend the state constitution. The decision was rested on the basis of the state's discretion. In exercising this discretion, not unreasonably, the state was not unconstitutionally infringing Summers' religious freedom.

Cases concerning state employment afford another example of the extent to which the state's discretion may validly affect or abridge First Amendment rights, in balancing the state's interests against those rights. In *Adler v. Board of Education*, 342 U.S. 485 the Court sustained the Feinberg Law of New York which provided for disqualification of teachers and school employees who advocated the overthrow of the government by unlawful means or who were members of organizations having that purpose. Therein this Court said that, while it was clear that teachers had a right to assemble, speak and think as they wished, it was "... equally clear that they have no right to work for the State in the school system on their own terms." 342 U.S. at 492. The Court declared that there was no limitation on the freedoms of speech and assembly except in the remote sense that such a limitation is inherent in any choice. *Garner v. Board of Public Works*, 341 U.S. 716 also involved assertion of free speech violation by a city ordinance requiring a loyalty oath as a prerequisite of city employment. The Court upheld the oath requirement, however, without referring to the speech claim. *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245, upheld a state requirement of compulsory military training as a condition precedent to enrollment in land grant colleges in face of the claim that it violated freedom of religion.

These principles are recently restated in *Slochower v. Board of Education*, 350 U.S. 551 (1956), modified,

351 U.S. 944 (1956). The statute there required the dismissal of school teachers invoking the Fifth Amendment. This violated due process, there being no reasonable connection between invocation of the Fifth Amendment and incompetency to teach. There is no such shortcoming herein. But the language of *Slochower* is helpful in stating the problem:

“The problem of balancing the State’s interest in the loyalty of those in its service with the traditional safeguards of individual rights is a continuing one. To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities.” 350 U.S. at 555.

We submit that this is the problem which confronts the state in granting tax exemptions. It is incumbent on the state to take reasonable precautions to avoid giving tax benefits to organizations which will use them in pursuance of activities which were not intended to be subsidized. By substituting the word “exemption” for “employment” in the above quotation from *Slochower* its principle applies to the cases at bar. Here, as in *Garner* the state’s inquiry is a reasonable one for valid reasons and does not unconstitutionally infringe any rights of religion, speech, assembly, or press.

Finally, in weighing the interests in a free speech context, this Court will observe the deference due the

legislative determination. Declaring it a matter for legislative rather than judicial determination, Mr. Justice Frankfurter said:

"But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. . . .

"Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress." *Dennis v. United States*, 341 U.S. 494, 525.

In sum, we submit that the deep interest of Cal. in determining the proper administration of its tax policy far outweighs any indirect and unsubstantial incursion of Petitioners' free speech.



## III.

**The Cal. Supreme Court's Determination was Sound, that the Smith Act Did Not Preclude the State's Action** (in supplement of Point VI, Resp. Consol. Br. p. 66).

Petitioners conclude that *Commonwealth v. Nelson*, 350 U.S. 497 (1956) renders invalid Article XX, Section 19 of the Cal. Constitution and Section 32 of the Revenue and Taxation Code. This Court there struck down the Pennsylvania sedition law on the ground that the federal government had, by the Smith Act, occupied the field of punishing sedition. In holding that Congress had excluded the states from the enforcement of " . . . anti-sedition statutes, criminal anarchy laws, criminal syndicalist laws, etc.," 350 U.S. at 508, the Court stated three considerations by which state legislation should be tested. These tests are: the intent of Congress to occupy the field, the existence of a dominant federal interest in the area, and a harmful conflict of administration. Tested by these considerations the Cal. constitution and statute do not fail.

The three tests presumably cannot be applied independently of one another. To ascertain the intent of Congress, reference must be had to the other considerations, *viz*, the existence of a dominant federal interest and the probability of a harmful conflict of administration, since these are the considerations on which Congress must have formed its assumed intent.

Preliminarily it is to be remembered that it is a tax statute before the Court. Consequently, it is not in a field jointly occupied by the state and federal governments which the latter can occupy to the exclusion of the state. The state has the power to tax because it is sovereign. Hence, there could hardly be a valid federal intent to occupy the field; nor a valid dominant federal interest in the area; nor the possibility of a harmful conflict of administration.

The determining factor on the question, whether or not the federal government has occupied the field is the existence of a dominant federal interest. As has been pointed out, there is no such federal interest in the field of state taxation. Nor can federal interest in the field of enforcement of criminal sedition laws be such as to invalidate a state tax statute which in no way impinges on that enforcement.

In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, there was a conflict between a state law and a federal law regulating warehouses. And, as in *Nelson*, the conflict was one of administration; and the conflict was necessarily resolved in favor of the superior federal interest. See also *Hines v. Davidowitz*, 312 U.S. 52. The instant case presents no such problem.

*Slochower v. Board of Education*, 350 U.S. 551 (1956), modified, 351 U.S. 944 (1956), decided one week after *Nelson*, is a case analogous to the one at bar. Though holding the state's action unconstitutional, the Court said, *inter alia*: "The problem of

balancing the *State's interest in the loyalty* of those in its service with the traditional safeguards of individual rights is a continuing one. . . . " . . . Slochower's continued employment . . . [might] be inconsistent with a real interest of the State." 350 U.S. at 555, 559. (Emphasis supplied.) In reaching this conclusion the Court referred favorably to its pre-Nelson holdings of *Adler v. Board of Education*, 342 U.S. 485 (1952) and *Garner v. Board of Public Works*, 341 U.S. 716 (1951). The clear implications of the *Slochower* decision is that the Court did not intend the *Nelson* decision to extend to the instant case.

The state is not here seeking to enforce any sedition law. It is not imposing any criminal penalty for seditious acts. The only criminal prosecution which could occur would be prosecution for perjury, a field not occupied by the federal government to the exclusion of the states.

The words of Chief Justice Hughes in *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1 are appropriate:

"The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'." 302 U.S. at 10.

“The exercise of federal supremacy is not lightly to be presumed.” *Schwartz v. Texas*, 344 U.S. 199, 203. The federal government has indicated no intent to occupy the field of the present statute and, indeed, *quaere* whether it could. None of the reasons for invalidation of the state statute in *Nelson* are present here. As this Court has indicated in *Slochower* the state still has a valid interest in the loyalty of its school teachers. The state’s interest is just as valid when it concerns those, like petitioners, seeking a tax exemption.

### **Conclusion**

We respectfully submit that the petitions should be dismissed and the decisions by the California Supreme Court be affirmed.

Respectfully submitted,

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and

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**SUPREME COURT. U. S.**

**MOTION FILED FEB 14 1958**

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**Supreme Court of the United States**

**OCTOBER TERM, 1957**

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**No. 382**

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**THE FIRST UNITARIAN CHURCH OF LOS ANGELES,  
a Corporation,**

*Petitioner,*

*vs.*

**COUNTY OF LOS ANGELES, CITY OF LOS ANGELES, H. L.  
BYRAM, COUNTY OF LOS ANGELES TAX COLLECTOR, et al.,**

*Respondents.*

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**No. 385**

**VALLEY UNITARIAN-UNIVERSALIST CHURCH, INC.,**

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*vs.*

**COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF LOS ANGELES,  
CALIFORNIA; H. L. BYRAM, County Tax Collector, et al.,**

*Respondents.*

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF CALIFORNIA**

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**MOTION FOR LEAVE TO FILE BRIEF OF AMER-  
ICAN CIVIL LIBERTIES UNION AS AMICUS  
CURIAE, AND BRIEF, AMICUS CURIAE**

---

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

---

## MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The American Civil Liberties Union, hereinafter called the "Union", respectfully moves for leave to file a brief *amicus curiae* in these cases. The attorneys for petitioners

consented to the filing, but the attorneys for respondents have refused consent.

The Union is a long-established, nationwide, non-partisan organization devoted to the protection and preservation of the fundamental freedoms guaranteed to citizens of this country by federal and state constitutions. It believes that no human freedoms are more vital than those assured in the First and Fourteenth Amendments of the United States Constitution. More particularly, it believes in the freedoms of speech and religion and the principle of separation of church and state.

The Union is interested in the instant cases because of its concern and belief that the laws of California relating to tax exemptions, particularly as applied herein against the petitioners by the California taxing authorities and courts, constitute a violation of the freedoms of speech and religion and of the principle of separation of church and state.

The *amicus curiae* briefs of the Union have been accepted by this Court in all of the recent cases involving the principle of separation of church and state (*Cf., Everson, McCollum, Doremus and Zorach* cases).

Although various aspects of these issues have been raised by petitioners in the State courts and in the petitions for writ of certiorari, there seems to be a strong likelihood that certain aspects thereof will not be discussed or given adequate emphasis.

In its annexed brief the Union believes that it has discussed certain aspects of the constitutional issues involved which either have not been mentioned ~~or~~ have not been fully treated by the parties and that this discussion will be helpful to this Court.



The Union respectfully moves that it be granted leave to file the accompanying brief.

Respectfully submitted;

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New York City, N. Y.,  
*Attorney for American Civil Liberties  
Union, as Amicus Curiae.*

ROWLAND WATTS,  
*Of Counsel.*

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STATE OF CALIFORNIA

## BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

### Interest of American Civil Liberties Union

The interest of American Civil Liberties Union in these cases has been stated in the annexed motion.

### Statement of Case

The facts alleged in the complaints of petitioners (plaintiffs below) are deemed true (R. pp. 1-32)\*. The Supreme Court of California, in a 4 to 3 decision (R. pp. 35-89) has in each case, rendered judgment for defendants (respondents here) following an order sustaining a general demurrer to the complaint without leave to amend (R. p. 35).

Petitioners are Unitarian-Universalist churches in the City and County of Los Angeles. They are non-profit religious corporations duly organized under the laws of California. Their respective properties, admittedly, are devoted exclusively to religious purposes (R. pp. 1, 2).

Section 11½ of Article XII of the California Constitution provides taxation exemption for all buildings and real property "when the same are used solely and exclusively for religious worship".

Petitioners have been denied such tax exemption solely because in executing and filing claims for such tax exemption they have declined to execute, and have stricken from the body of the required claim-forms, the declaration or oath prescribed by Section 32 of the Revenue and Taxation Code, (enacted statutes of 1953, Chapter 1503, Section 1, page 3114) reading as follows (R. pp. 8, 37):

"That applicant does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign Government against the United States in the event of hostilities."

The requirement of this oath is based on, and is said to be in implementation of, Article XX, Section 19 of the

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\* References are to page numbers of Transcript of Record in Case No. 382.

California Constitution, adopted Nov. 4, 1952, which provides:

"Notwithstanding any other provision of this Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:

(b) Receive any exemption from any tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State."

Petitioners duly executed and filed, on forms furnished by the county tax assessor, claims of exemption from taxation as to their properties, except in the sole respect that petitioners caused to be stricken therefrom and declined to execute the above mentioned oath. Thereupon the county tax assessor denied and disallowed petitioners' claims of exemption as to their church properties and assessed said properties for taxes in the same manner as non-exempt properties. Petitioners paid said taxes under protest and brought this action to recover same and for declaratory judgment.

In Case No. 382 the trial court sustained respondents' demurrer without leave to amend and entered judgment dismissing the action. On appeal the Supreme Court of California (4-3) affirmed (311 Pac. 2d 508):

In Case No. 385 the trial court overruled the demurrer and granted judgment in favor of petitioner, ordering a refund. The Supreme Court of California (4-3) reversed

that judgment and dismissed the complaint (311 Pac. 2d 540).

In Case No. 385, by leave of this Court, the Valley Unitarian-Universalist Church, Inc., was substituted as petitioner in place of the People's Church of San Fernando Valley, Inc. (26 U. S. Law Week 3177); and the two cases were consolidated (26 U. S. Law Week 3128).

### **Brief Statement of the Position of the Union**

The provisions of the California Constitution and statute requiring petitioners to subscribe to said declaration or oath, as a condition to exempting their church properties from taxation, constitute a violation of the First and Fourteenth Amendments of the United States Constitution.

The First Amendment of the Federal Constitution as read into the Fourteenth Amendment, makes invalid any State law "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press". The States and all their agencies are as incompetent as Congress to enact laws or give sanction to acts which are in conflict with the prohibitions of the First Amendment.

The aforesaid provisions of the constitution and statutes of California, on their face and as applied herein against petitioners, constitute a violation of the rights of freedom of religion and speech of petitioners, and of each of their individual members, and of the principle of separation of church and state.

The judgment below should be reversed.

It is not the purpose of this brief to cover all the points briefed by the parties, but rather to discuss several points not raised or emphasized by the parties.

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## POINT I

**The oath requirement constitutes an unconstitutional prior restraint on the exercise of free speech and religion.**

The tax exemption was not denied to petitioners because they have advocated, or are advocating, either the overthrow of the State or Federal governments by force or violence or other unlawful means or the support of a foreign government against the United States in the event of hostilities. There was no finding, and there was no charge or evidence, that petitioners had engaged or were engaging in such advocacy.

This is not a situation where the tax exemption was denied or revoked because petitioners had been duly found to be engaging in such advocacy (quite apart from the question of whether such advocacy can be constitutionally prohibited, in any event). Here, the denial of a tax exemption was based solely on petitioners' refusal to subscribe to a declaration or oath of non-advocacy imposed by the statute and embodied in a prescribed tax exemption claim form.

In this process the taxing authorities have arbitrarily assumed that petitioners are engaging in such advocacy simply because they refuse to subscribe to an oath that they are not doing so. Not even is there a showing of a threatened or imminent act of such advocacy on the part of petitioners.

This presents a clear instance of an unconstitutional prior restraint or censorship on the exercise of free speech and free religion.

There is some difference between the California Constitutional provision (§19, Art. XX) and the "implement-

ing" statutory provision (§32, Revenue and Taxation Code).

Under that Constitution, a tax exemption may not be received by a person or organization which *advocates* the proscribed conduct. The criteria for exemption is, or appears to be, actual advocacy.

Under the statute, however, the tax exemption cannot be received unless the claim for exemption contains a subscribed declaration that the person or organization making same "does not" advocate the proscribed conduct; and it is a felony to make a false declaration. The criteria for exemption is not actual advocacy, but the making of a declaration of non-advocacy.

But whether the tax exemption is denied because of such actual advocacy or because of a failure to subscribe to a declaration of non-advocacy, the result is an unconstitutional restraint on free expression.

Furthermore, the Constitutional and statutory provisions both embody two types of advocacy (1) the overthrow of the government by force or violence or other unlawful means and (2) the support of a foreign government against the United States in the event of hostilities.

No distinction is drawn in the California Constitution or statute between advocacy of abstract doctrine and advocacy directed at promoting unlawful action. The denial of tax exemption is not predicated upon advocacy of action at all. It is not predicated upon the advocacy of immediate action rather than action at some remote future time.

The denial of tax exemption is not related to the sort of advocacy which incites to, and has a tendency to produce, illegal and forcible action. It is not related to any clear and present danger or to the prevention of any grave and immediate danger to interests which the State may lawfully protect. As implemented by the statute and as

applied to petitioners, the advocacy proscribed by California as a condition of tax exemption, is divorced from any effort to incite action and any clear and present danger. There is no finding or claim that petitioners are communist or subversive organizations.

The kind of advocacy which these California laws, as applied, are designed to suppress is not the kind of advocacy which may be constitutionally prohibited to a church, or anyone else. See *Yates et al. v. United States*, 354 U. S. 298 (1957); *American Communications Assn. v. Douds*, 339 U. S. 382, 412 (1950); *Whitney v. California*, 274 U. S. 357, 373, 376-7 (1927).

Even if the kind of advocacy, here sought to be proscribed by the California laws as a condition for church tax exemption, could be regarded as criminal, or illegal or constitutionally prohibited under the First and Fourteenth Amendments, which is denied, it would be time enough for California to refuse tax exemption to churches such as petitioners if and when they are found to be actually engaged in such advocacy, and not before.

As Thomas Jefferson said in the "Virginia Statute for Religious Liberty":

"\* \* \* that the opinions of men are not the object of civil government, nor under its jurisdiction; that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the propagation of principles on supposition of their ill tendency is a dangerous fallacy which at once destroys all religious liberty \* \* \*: that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."

As long as petitioners are using their properties solely for religious purposes and are not found to be actually engaging in advocacy not protected by the First and Fourteenth Amendments against state action, they should

not, and cannot legally, be penalized by being refused a tax exemption otherwise available to all religious organizations in California.

In the present context, the following words from the separate opinion of Justices Black and Douglas in *Yates*; *supra*, 354 U. S. 298, 343-4, bear repeating:

"Doubtlessly, dictators have to stamp out causes and beliefs which they deem subversive to their evil regimes. But governmental suppression of causes and beliefs seems to me to be the very antithesis of what our Constitution stands for. The choice expressed in the First Amendment in favor of free expression was made against a turbulent background by men such as Jefferson, Madison and Mason—men who believed that loyalty to the provisions of this Amendment was the best way to assure a long life for this new nation and its Government. Unless there is complete freedom for expression of all ideas, whether we like them or not, concerning the way government should be run and who shall run it, I doubt if any views in the long run can be secured against the censor. The First Amendment provides the only kind of security system that can preserve a free government—one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines—however obnoxious and antagonistic such views may be to the rest of us."

As was stated in *Board of Education v. Barnette*, 319 U. S. 624, 639, 641, 642 (1943):

"But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.

•   •   •

"Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the grave yard.

"But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."

In that case the Court held that children could not be expelled from the public schools for failure, on religious grounds, to recite a pledge of allegiance.

Prior restraints by a State on expressions of speech and religion, effected, directly or indirectly, by means of loyalty oaths or use of taxing power, or otherwise, are unconstitutional under the 1st and 14th amendments. That applies to these California laws.

## POINT II

**The requirement of such a loyalty oath as a condition to a tax exemption, otherwise granted, is in effect a tax to accomplish a prior restraint on freedom of expression.**

As is pointed out by the California Supreme Court (R. 38-9), church organizations, throughout the history of California, have been exempt from taxation, either by



statute or constitutional provision. The present California Constitution (Section 11½ of Article XIII) provides taxation exemption for all buildings and real property "when the same are used solely and exclusively for religious worship".

Provision has long been made for the exemption of church property from taxation, in every one of the 48 States in this country, either by constitution or statute. The exemption is granted on the premise that religious organizations are a benefit to society, that they promote the social and moral welfare and that, to some extent, they are bearing burdens that would otherwise be imposed upon the public to be met by general taxation. (Torpey, "Judicial Doctrines of Religious Rights in America", pp. 172-5 (1948).) As stated in 84 Corpus Juris Secundum p. 586 § 289, "The policy on which exemption is predicated is the encouragement of religion for the public welfare" *First Unitarian Soc. of Hartford v. Town of Hartford*, 66 Conn. 368 (1895).

Admittedly, petitioners' buildings and property are used solely and exclusively for religious worship.

There is no showing by respondents that petitioners' properties have not been, are not being, or will not be, used solely and exclusively for religious worship, and petitioners have not been refused exemption on that ground.

Petitioners have been refused tax-exemption solely because, in making claim for such exemption, they have declined to subscribe to said loyalty oath. The oath requirement bears no relation to the traditional, universal reasons for granting tax exemption to church properties.

California, thus, is now using its power of taxation, and particularly its tax exemption power, to coerce the

taking of said loyalty oath and thereby to effect a prior restraint on, and suppression of, the exercise of freedom of speech and of religion. California, thus, grants tax exemption to religious bodies that subscribe to the required loyalty oath, and denies tax exemption to religious bodies that fail or refuse to do so. It imposes taxes on non-oath taking churches and exempts from taxation oath taking churches. The test of taxation, or exemption from taxation, under the challenged California laws is no longer the religious use of property test, but a political loyalty test. That such oath, or oath taking generally, is contrary to religious principles or conscience is disregarded.

This Court has pointed out that taxes may not be used by a State to suppress or to prohibit freedom of speech or freedom of religion. (*Grosjean v. American Press Co.*, 297 U. S. 233 (1936); *Follett v. McCormick*, 321 U. S. 573, (1944).)

In *Grosjean* this Court stated (at pp. 245, 274):

"For more than a century prior to the adoption of the amendment—and, indeed, for many years thereafter—history discloses a persistent effort on the part of the British government to prevent or abridge the free expression of any opinion which seemed to criticize or exhibit in an unfavorable light, however truly, the agencies and operations of the government. The struggle between the proponents of measures to that end and those who asserted the right of free expression was continuous and unceasing."

"The aim of the struggle was not to relieve taxpayers from a burden, but to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government."

So here, the real purpose of the challenged California laws is to prevent or abridge free expression of opinions which are critical of the agencies and operations of the State and Federal governments, particularly in respect of their possible misdoings. As pointed out in *Grosjean*, the use of its powers of taxation was one of the favorite methods of the British government to suppress governmental criticisms. The framers of the First Amendment were familiar with the English struggle and sought to preclude future odious methods of taxation designed to effect such prior restraints on freedom of expression.

In *Follett*, this Court said (at p. 577):

"The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious (*Grosjean v. American Press Co.*, *supra*; *Murdock v. Pennsylvania*, *supra*) as the imposition of a censorship or a previous restraint. *Near v. Minnesota*, 283 U. S. 697. For, to repeat, 'the power to tax the exercise of a privilege is the power to control or suppress its enjoyment.' *Murdock v. Pennsylvania*, *supra*, p. 112."

This California tax-exemption law is a dangerous step in that direction of control and suppression.

That the denial of such tax exemption to churches is a serious penalty and can result in the closing of churches is made manifest from the "excusing legislation" by California, which recites that "Some churches have inadvertently failed to file the required affidavit in support of the tax exemption of their property, and as a result now are confronted with obligations which, if met, will substantially impair their ability to function effectively" (California Statutes 1955, c. 6, p. 441; California Statutes 1957, c. 4, (Sen. Bill 202; West's 1957 California Legisla-

tive Service, p. 5). A "substantial impairment of ability to function effectively" is but a short step away from a final closing of church doors.

### POINT III

**Requiring petitioners to subscribe to such an oath in order to receive a tax exemption of church property, otherwise available to them and other churches, violates the principle of separation of church and State and prohibits the free exercise of religion.**

By subscribing and adhering to such an oath these petitioners would be forced to compromise their corporate religious principles and to forfeit what they consider to be their God-given right to advocate and expound principles of the Universal Moral Law and ~~to~~ express moral judgments in respect of acts of government.

In the event that the United States should engage in hostilities with a foreign government, petitioners would be precluded, by such an oath, from advocating the support of such a foreign government, under any circumstances, irrespective of how morally right that foreign government might be and how morally wrong the United States government might be.

Freedom to worship God according to the dictates of one's conscience and to teach and express the will of God as one is illumined to it, would be a mockery if religious societies could not voice moral judgment on unconscionable acts of government, in domestic or foreign affairs.

It should not so soon be forgotten that among the complaints in our "Declaration of Independence" against the King of Great Britain was his imposition of unjust taxes; his use of "large armies of foreign mercenaries

to complete the works of death, desolation and tyranny already begun, with circumstances of cruelty and perfidy unworthy the head of a civilized nation"; and his waging of "cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of distant people, who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither": (Text quoted is the original text of "The Declaration of Independence"; as reported to Congress, 1776.)

If the United States were to engage in a warfare of cruelty and perfidy unworthy of a civilized nation, or were to wage cruel war against a segment of humanity violating the most sacred rights of life and liberty of innocent, inoffensive peoples, would not petitioners and other religious societies in this country be justified, in the name of the universal God, in denouncing such acts and in advocating support for the victims thereof, as did the founders of this country? God and the Moral Law are not nationalistic, but universal, according to petitioners.

What if the United States, as a member of the United Nations and one of the original signatories of its Charter, were to violate that Charter by engaging in acts of aggression against a helpless nation, and what if the other members condemned the United States and invoked sanctions against it? Would not petitioners be justified in criticizing the government responsible therefor and urging support for the helpless victims of such aggression?

The general religious principles of these petitioners are in harmony with the sentiments expressed by Thomas Paine: "My Country is the World. My Religion is to do good"; and those expressed by William Lloyd Garrison: "Our Country is the World—Our countrymen are all mankind."



That, too, is the lofty concept behind the United Nations.

The California law would restrict churches of God and of Christ to an advocacy of the older, nationalistic concept aptly expressed by Stephen Decatur: "In our intercourse with foreign nations, may she always be in the right; but our country, right or wrong."

The hope is ever present that our country will always be in the right. But petitioners believe that if our country should be in the wrong, they should have the freedom to say so in the name of God, the universal Moral Law and humanity, and to advocate means of correcting the wrong and support of the wronged and oppressed.

Among the religious principles espoused by petitioners is "Universal brotherhood, undivided by nation, race or creed" and "Allegiance to the cause of a united world community" (R. 24). However noble or God-inspired, the advocacy and practice by petitioners of "a universal religion of reason, brotherhood and good will", of a "common reverence for life, wherever it may be found" and of "allegiance to the cause of a united world community undivided by nation, race or creed", (R. p. 25) might easily result in the condemnation of a tyrannical, cruel and inhuman government and the urging of the support of the foreign victims of that government's acts.

The question arises whether the Christian churches of this country, in order to obtain tax exemption, must forego advocacy of the support of Christians and other children of the universal God in other lands, if the latter were to be the victims of inhuman treatment, in hostilities, by the United States. This possibility may seem to be far fetched in view (at least, our own view) of the benign and humane attitude of our country, historically, in its relations with foreign peoples, but the situation could quickly change in this age of atomic weapons and

with frequent changes in governmental officials. The question arises, also, as to whether Christian churches are to be foreclosed from believing, practicing and advocating the teachings of the Sermon on the Mount, such as love your enemies and bless the peacemakers who shall be called the Children of God.

It is barely conceivable that Jefferson's oft-quoted remark: "Rebellion to Tyrants is Obedience to God" which epitomized the justification for the Colonies throwing off the government of Great Britain, may again have application in this country; and the voices of the universal God, as raised in the churches, should not be stilled by the imposition of prior restraints on speech and religion.

The oath involved here is not designed for tax revenue purposes or to aid religious societies in their general welfare work, but rather to coerce a uniformity of political sentiment favorable to any and all acts of government, whether such acts are morally right or morally wrong. It is an oath of allegiance, unlimited as to time or circumstances. In *Girouard v. United States* (1945), 328 U. S. 61, which involved an oath of allegiance required of a prospective citizen, this Court stated (pp. 68-9):

"The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. As we recently stated in *United States v. Ballard*, 322 U. S. 78, 86,

'Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education v. Barnette*, 319 U. S. 624.' The test oath is abhorrent to our tradition."

In the *Girouard* case this Court quoted with approval from the dissenting opinion of Chief Justice Hughes and Justices Holmes, Brandeis and Stone in *United States v. Macintosh* (1939), 283 U. S. 605 and the teachings of this latter opinion now have application here. The *Macintosh* case concerned an oath of allegiance upon the taking of which was conditioned the privilege of naturalization. In certain aspects that oath is very similar to the one involved here. While *Macintosh* expressed a willingness to take the oath, he explained that he was not willing "to promise beforehand" to take up arms, "without knowing the cause for which my country may go to war" and that "he would have to believe that the war was morally justified". He declared that "his first allegiance was to the will of God"; and that "he could not put allegiance to the Government of any country before allegiance to the will of God" (ed., p. 629). The dissenting opinion stated (pp. 633, 634, 635):

"Much has been said of the paramount duty to the State, a duty to be recognized, it is urged, even though it conflicts with convictions of duty to God. Undoubtedly that duty to the State exists within the domain of power, for government may enforce obedience to laws regardless of scruples. When one's belief collides with the power of the State, the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the State has always been maintained. . . . The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. . . . One cannot speak of

religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God. . . . *The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field.*

. . . There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. *The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts.*

"Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. There is nothing new in such an attitude. *Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression.*" (Italics supplied.)

There is no need to recite here the terrible history of mankind associated with the use of oaths and ceremonies to coerce allegiance to the State. One example should suffice. In "The Story of Civilization: Caesar and Christ" (1944), Will Durant (at pp. 646-52) describes the war of church and state (A. D. 64-311) between the Roman government and the Christians. The Christians were horribly persecuted for refusal to burn incense before a statue of the emperor, which ceremony "had become a

sign and affirmation of loyalty to the Empire, like the oath of allegiance required for citizenship today"; for refusal to join in the universal *supplicatio* to the state gods of Rome, an act designed to "strengthen national enthusiasm and unity"; and to conform to other like Roman ceremonies of allegiance. The Christians, on their part, passed moral judgment on the Roman government, "ridiculed its gods, rejoiced in its calamities and predicted its early fall". Many Christians refused military service. Says Durant (at p. 64) "On its side the Church resented the idea that religion was subordinate to the State. . . . The Roman government concluded that Christianity was a radical—perhaps a communist—movement subtly designed to overthrow the established order." Cf. *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 641 (1943). Would California, this country or the world be better off, if the Christians had been effectively suppressed, by a Roman state become morally decadent?

The First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. The principle of separation of Church and State includes the proposition that the government should not interfere with the beliefs of any religious individual or groups, or with any acts giving expression to those beliefs unless and until it appears that such acts have actually occurred and have exceeded permissible constitutional limits. (Cf. *Everson v. Board of Education*, 330 U. S. 1 (1947); *McCullum v. Board of Education*, 333 U. S. 203 (1948); *Cantwell v. Connecticut*, 310 U. S. 296 (1940).

When the State, directly or indirectly, intrudes itself into the field of religion, particularly to restrain in advance the propagation of principles on mere supposition of their unlawful tendency, it breaches the wall of separation and destroys religious freedom. We believe



that is what California has done here. If and when any religious society oversteps the legitimate bounds of its free exercise of religion then, and only then, should the State take steps to penalize it. The penalty should be for the abuse of the rights—the rights should not be curtailed in advance. (*DeJonge v. Oregon*, 299 U. S. 353, 364-5 (1937).)

Governments like ours that derive “their just powers from the consent of the governed” should not attempt to throttle criticism by the governed by the device of such oaths—especially that segment of governed who are motivated by a universal Moral Law and an allegiance to God. Cf. Justice Jackson, in *American Communications Assn. v. Douds*, 339 U. S. 382, at 442-3 (1950):

Any resort to such methods, by direction or indirection, seems to us to be out of harmony with the principles upon which this country was founded, epitomized in the First Amendment.

#### POINT IV

**California law violates the religious freedom of each individual member of petitioner churches. Because of the nature of these churches, such an oath or declaration could not be executed by petitioners on behalf of the individual members thereof.**

Petitioners are Unitarian-Universalist churches. They are congregational type churches because they adhere to the congregational form of church polity, the essential peculiarity of which is the maintenance of the independence of each congregation or society in all matters of ecclesiastical government, discipline, doctrine and practice, including the right of the members of that society to change its religion. Universalists and Unitarians, as well as Quakers, are congregationalists in this sense. 76 *Corpus Juris Secundum*, p. 740; *Hale v. Everett*, 53 N. H.

9, 137-38 (1868); *Attorney General v. Dublin*, 38 H. H. 459, 541-4 (1859); cf. *Watson v. Jones*, 80 U. S. 679, 724-5 (1871); "Religion in America", *Sperry* (1946) pp. 283-5; *Rosten*, "A Guide to the Religions of America" (1955) p. 147.

One of the working principles of Unitarian-Universalist churches is "Individual freedom of belief" on the part of each member (R. pp. 14, 21): "These churches have no dogma or creeds as a condition of membership or which every member of the church must accept. Instead, each member works out for himself his own creed or statement of beliefs and relies upon his conscience to guide him. No minister, officer or member of such a church can tell any other member what is right or how he should behave. In short, there is no authority, ecclesiastical or otherwise, within or without such churches, that can state, direct or control the individual beliefs of the members thereof. The "priesthood of the believer" is a reality in these churches. As Rosten, *supra*, says:

"Unitarians are decidedly individualistic in their religion; they prefer to let every Unitarian speak for himself about his faith. Unitarians are firm believers in 'the Church Universal.' . . . Membership in the Church Universal depends not upon the profession of a formal creed, but simply upon the honest desire in a person's heart 'to do justly, to love kindness, and to walk with thy God.' . . . Unitarians . . . worship 'differently' because they believe that every individual has the right to approach his God in his own way, and that every religious community has a duty of creating such patterns of worship as best serve the needs of those who worship."

\* According to Sperry, 35 per cent of total church membership in this country, as of 1943, were in churches organized on a congregational polity basis.

See, also, "What Americans Believe and How They Worship" by Williams (Harpers, 1952), pp. 223-28, where it is stated: "Unitarians want no part of a restrictive creed; they insist on freedom of belief."

Petitioners, in order to apply for the tax exemption which they have for many years enjoyed as religious organizations, were called upon to execute a claim-form, required and furnished by the county tax assessor, embodying the oath or declaration in question.

Under Section 32 of the California Revenue and Taxation Code (Calif. Stats. 1953, c. 4503, p. 3114; §1), the claim for exemption must contain "a declaration that the person or organization making the statement, return or other document does not advocate the overthrow of the Government of the United States of the State of California by force or violence or other unlawful means or advocate the support of a foreign government against the United States in the event of hostilities." Thereunder, failure of such person or organization to make such a declaration precludes exemption from the tax; and any person or organization who makes such declaration falsely is guilty of a felony.

Under the prescribed claim-form petitioners were, necessarily, the "applicants". Since petitioners are religious corporations, such forms were required to be executed by a corporate officer. However, such an oath or declaration as is contained in such form is not, and cannot be made, binding on the individual members of petitioner churches, because of the very nature of those churches and the religious principles of their members, mentioned above. Petitioners are not unitary, national or authoritarian churches, their polity not being presbyterian or episcopal. No officer, minister or member of these churches has any authority to take, or subscribe to, an oath or declaration intended to be binding on the other members. It is extremely doubtful that the statutory

crime for falsely executing such an oath or declaration could be imputed to any individual member of petitioner churches who did not personally subscribe to or execute same.

Actually, therefore, petitioners could not effectively subscribe to such a declaration, quite apart from other reasons for not doing so.

Since no such oath or declaration can be made on behalf of, or binding upon, petitioners' individual members, it could be disregarded by any such member in good conscience, as not in accordance with his individual freedom of belief. The questions arise as to how any religious organization, such as petitioners, can duly execute or conform to such an oath, and how it could be made enforceable. In taking such an oath any minister, officer or member could act only on behalf of himself and not on behalf of the other members. Furthermore, any minister, officer or member can speak or advocate, in or out of church meeting, only for himself; and what he says or does is not binding on the other members of these churches or on the religious bodies as a whole.

No such problem could arise in connection with the making of the usual claim for exemption of church property from taxation, because the usual claim-form does not embody such an oath or declaration and because, in that situation, the only statement necessary to be signed is one that the churches are using their properties solely for religious purposes, which statement could not impinge upon or conflict with any religious principle or practice of petitioners or their members.

Thus, in its practical operation, these California laws discriminate against churches like petitioners and favor the unitary, authoritarian type of churches. These laws, therefore, prefer one religion over another in violation of the "establishment of religion" clause of the 1st Amendment. *Everson* and *McCullum* cases, *supra*; *Zorach v. Clausen*, 343 U. S. 306, 313 (1952).

## Conclusion

This case is one of first impression in this Court. It involves a new form of an oath of allegiance and a novel method of forcing obedience to it. The effect, if not the design, of these California laws is to throttle in advance freedom of speech and religion and to breach the wall of separation of church and state. Whatever high motives of nationalism or patriotism may have prompted these laws, they are inconsistent with the liberties and principles inherent in the First Amendment upon which this country came into being and was founded.

We respectfully submit that the decisions of the California Supreme Court should be reversed, with a declaration that the provisions of the California constitution and statute, inherently and as applied against these petitioners, are unconstitutional under the First and Fourteenth Amendments.

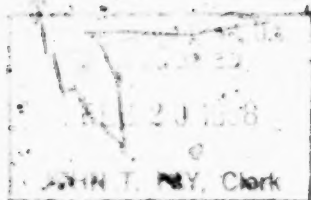
Respectfully submitted,

KENNETH W. GREENAWALT,  
*Attorney for American Civil  
Liberties Union, Amicus Curiae.*

ROWLAND WATTS,  
*Of Counsel.*



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No. **382 - 385**

IN THE  
**SUPREME COURT**  
OF THE  
**United States**  
October Term, 1957

THE FIRST UNITARIAN CHURCH OF LOS  
ANGELES,

*Petitioner,*

vs.

COUNTY OF LOS ANGELES, CITY OF LOS  
ANGELES, H. L. BYRAM, COUNTY OF LOS  
ANGELES TAX COLLECTOR, et al.,

*Respondents.*

VALLEY UNITARIAN-UNIVERSALIST  
CHURCH, INC.,

*Petitioner,*

vs.

COUNTY OF LOS ANGELES, CALIFORNIA;  
CITY OF LOS ANGELES, CALIFORNIA;  
H. L. BYRAM, COUNTY TAX COLLECTOR,

*Respondents.*

**OBJECTION TO MOTION FOR LEAVE TO  
FILE BRIEFS AMICUS CURIAE IN  
SUPPORT OF PETITIONER**

HAROLD W. KENNEDY, County Counsel  
and  
Gordon Boller  
• Assistant County Counsel  
*Attorneys for Respondents.*

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COUNTY OF LOS ANGELES, CALIFORNIA;  
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H. L. BYRAM, COUNTY TAX COLLECTOR,

*Respondents.*

No. 385

**OBJECTION TO MOTION FOR LEAVE TO  
FILE BRIEFS AMICUS CURIAE IN  
SUPPORT OF PETITIONER**

Respondents oppose the motion of American Civil Liberties Union and the motion of Philadelphia Yearly Meeting of the Religious Society of Friends, and American Friends Service Committee, Inc., for leave

to file briefs *amicus curiae* in support of petitioner herein. (The second mentioned notice of motion and the tendered brief bear the former title of the second of the two cases consolidated by order of this Court.)

Consent to file such briefs was orally requested of us some weeks ago but was refused. The reasons for withholding consent and for our opposition now to the motion were stated to be and are as follows: Petitioners' Consolidated Opening Brief filed herein does not fail to make adequate presentation of the material or any facts or questions of law in the cases. On the contrary, petitioners are represented by counsel, able and experienced in questions of Federal right and constitutional law and their presentation in this Honorable Court. A. L. Wirin, Esq., of counsel on Petitioners' Consolidated Opening Brief, last year celebrated his 25th year as counsel for the American Civil Liberties Union, in which capacity he has briefed and argued many causes in this court. Petitioners' Consolidated Opening Brief herein, we submit, fully presents all material facts and argues all questions of law involved.

The motions do not deny adequate presentation of facts and questions of law, but merely state inadequate contrary prediction and conclusion. The first motion merely recites that

"Although various aspects of these issues have been raised by petitioners in the State courts and in the petitions for writ of certiorari, there seems to be a strong likelihood that certain aspects thereof will not be discussed or given adequate emphasis.

"In its annexed brief the Union believes that it has discussed certain aspects of the constitutional issues involved which either have not been mentioned or have not been fully treated by the parties. . . ." (Motion, p. 2.)

No attempt is made to support such prediction of "strong likelihood" of slight to, or of want of "adequate emphasis" on, "certain aspects" of the issues. Any basis for the somber conclusion or any aspect of *amicus* promised more "adequate emphasis" are recited or indicated in the motion.

As noticed, American Civil Liberties Union is in effect already represented in the case and upon Petitioners' Consolidated Opening Brief, in the person of A. L. Wirin, Esq. In this, the tendered brief, if received, would constitute a second and extra brief in the cases by counsel for the American Civil Liberties Union.

The second motion similarly does not deny adequate presentation of fact and law but merely states inadequate contrary prediction and conclusion by recital that "applicants on information and belief aver that the oral argument and briefs of the parties to the case will not adequately present the argument to be made herein, which is directed solely to the contention that the California loyalty declaration offends that freedom of conscience which is asserted and professed by the Religious Society of Friends" (Motion, p. 3). No attempt is made to support such prediction and conclusion of inadequacy on the basis of the briefs sub-

mitted by petitioner in the State courts or, of the petition for certiorari or the character or ability of petitioners' counsel or other briefs by them in this court.

Petitioners' Consolidated Opening Brief now filed confutes the prediction and legal conclusion above recited, and in fact fully and carefully presents the facts and argues all questions of law, including *inter alia* the legal questions of freedom of religion and separation of church and state (Pet. Consol. Op. Br. p. 3, pp. 19-31). Also, the tendered second brief cites not a single case, text or legal authority beyond the very full presentation in Petitioners' Consolidated Opening Brief.

The motions fail to comply with the requirements of Supreme Court Rule 42. They do not state facts or questions of law that have not been or reasons for believing that they will not be presented by the parties.

WHEREFORE, respondents oppose the motions for leave to file said briefs.

DATED, February 14, 1958.

HAROLD W. KENNEDY, County Counsel  
and

Gordon Boller

Assistant County Counsel

*Attorneys for Respondents.*



MOTION FILED

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# In the Supreme Court of the United States

OCTOBER TERM, 1957

THE FIRST UNITARIAN CHURCH OF LOS ANGELES,  
a corporation,

*Petitioner,*

vs.

COUNTY OF LOS ANGELES, CITY OF LOS ANGELES,  
H. L. BYRAM, COUNTY OF LOS ANGELES TAX  
COLLECTOR, and JOHN R. QUINN, COUNTY OF  
LOS ANGELES ASSESSOR.

No. 382

VALLEY UNITARIAN-UNIVERSALIST CHURCH, INC.,

*Petitioner,*

vs.

COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF  
LOS ANGELES, CALIFORNIA; H. L. BYRAM,  
COUNTY TAX COLLECTOR.

No. 385

On Petitions for Writs of Certiorari to the Supreme Court  
of the State of California

**Motions of First Methodist Church of San Leandro  
and First Unitarian Church of Berkeley for Leave  
(1) to File Brief and (2) to Argue Orally as  
*Amici Curiae* in Support of Petitions**

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Boston, Massachusetts

*Of Counsel*

# In the Supreme Court of the United States

OCTOBER TERM, 1957.

THE FIRST UNITARIAN CHURCH OF LOS ANGELES,  
a corporation,

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vs.

COUNTY OF LOS ANGELES, CITY OF LOS ANGELES,  
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On Petitions for Writs of Certiorari to the Supreme Court  
of the State of California

**Motions of First Methodist Church of San Leandro  
and First Unitarian Church of Berkeley for Leave**

**(1) to File Brief and (2) to Argue Orally as**

***Amici Curiae* in Support of Petitions**

First Methodist Church of San Leandro and First Unitarian Church of Berkeley, both in California, hereby respectfully move the Court for leave to file the attached brief

*amici curiae* in support of the above captioned petitions for writs of certiorari to the Supreme Court of the State of California. The consent of counsel for petitioners has been obtained. The consent of counsel for respondents was requested but refused.

Said movants also respectfully move the Court for special leave to argue orally *amici curiae* in support of the petitions.

Movants respectfully request consideration of the two motions independently of each other as well as jointly.

The reasons for both motions stem from facts and are grounded in considerations now to be stated.

The movants appealed to this Court from the decisions against them by the Supreme Court of the State of California as reported in 48 Cal. 2d 901.<sup>1</sup> The filing of movants' Jurisdictional Statement (No. 485, October Term, 1957) on September 19, 1957, was timely. But it now appears that any action by the Court thereon will not, in the absence of special provision, permit hearing contemporaneously with Nos. 382 and 385 and that the decisions therein are likely to control movants' appeal.

Movant First Methodist Church of San Leandro is particularly concerned because it now appears that its constitutional rights may be determined upon the basis of decision in the above entitled consolidated cases involving only Unitarian Churches.

Movant First Methodist Church of San Leandro believes that the impact of the challenged California constitutional and statutory provisions denying traditional tax exemptions is particularly violative of its rights under the Constitution of the United States because of the special impact of such provisions upon the Methodist religion. Methodist religious

1. The cases of movants are consolidated before this Court as they were before the Supreme Court of the State of California.

disciplines and articles of faith differ significantly from the Unitarian (or Universalist) and are believed more representative of general Protestant religious faith.

Said movant respectfully suggests that since the impact of the state action is curtailment of religious liberty, the wider the spectrum of religious doctrine presented for the Court's consideration, the better will the Court be enabled to appraise the challenged state action.

Official Methodist religious discipline is plainly undermined and affronted by the challenged California action. That discipline, as reiterated in direct connection with the state action, includes:

"We protest legislation requiring the loyalty oath of any church to any state or nation. The church must be in the world but not of it. She belongs to no class, nation, or race. She belongs to Christ. The Church cannot serve two masters. She can obey but one, Jesus Christ. The Church must be free to bring all persons and institutions under the judgement of the gospel. In so far as the state is righteous, it has nothing to fear from the Church. In loyalty to her Lord the Church will be its grave and sturdy ally. But in so far as a state seeks to dominate, the Church must resist. Freedom is secure and justice is maintained only as the Church lives and works among free men, not as a creature subservient to the state, but as a free, unintimidated voice, speaking for Almighty God in opposition to error and evil, and in support of truth and righteousness."

Paragraph #2025 of The Methodist Discipline, 1956.

"We declare our support for those churches which are testing the constitutionality of the California law which requires a non-disloyalty declaration as a prerequisite for tax exemption. We hope that all of our churches will find ways of saying unequivocally that the church belongs to God and not to the state. We are loyal

to our state and nation, but if that loyalty ever conflicts with our loyalty to God, we must serve God first."

Statement Adopted by the California-Nevada Annual Conference: Page 136 of California-Nevada Annual Conference Journal, 1954.

"We must protect the freedom of the church to make moral judgements without coercion from any political institution."

Statement Adopted by the California-Nevada Annual Conference: Page 131 of California-Nevada Annual Conference Journal, 1955.

Movant First Unitarian Church of Berkeley here has the support of the American Unitarian Association, as it did below. Therefore it believes it may be positioned to present more comprehensive views. It appears not inappropriate to suggest that the national denominational body might be heard to advantage.

Said movant, recognizing the above referenced differences between Methodist religious doctrines and its own, respectfully joins in suggesting the merit of measuring the challenged California action against a broader spectrum of religious doctrine.

**The issues here are not of a narrow, schismatic nature; they transcend sect in touching millions of Californians. Movants believe that the challenged California measures are laws respecting an establishment of religion and prohibiting the free exercise thereof in violation of the Constitution of the United States. They believe that this question of law is crucial and merits further consideration than has been given it by the parties.**

Movants respectfully and deeply appreciate the burdens upon the time of this Court. They submit these motions only



after the most careful consideration and because they believe that the granting of both, as movants understand the governing rules and requirements, would entail no more than consideration of the single additional brief appended and an additional total of only thirty minutes of oral argument.

Respectfully submitted,

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March 14, 1958

**BRIEF OF  
FIRST METHODIST CHURCH  
OF SAN LEANDRO  
and  
FIRST UNITARIAN CHURCH OF BERKELEY  
*as Amici Curiae*  
IN SUPPORT OF PETITIONS**

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# In the Supreme Court of the United States

OCTOBER TERM, 1957

THE FIRST UNITARIAN CHURCH OF LOS ANGELES,  
a corporation,

*Petitioner,*

vs.

COUNTY OF LOS ANGELES, CITY OF LOS ANGELES,  
H. L. BYRAM, COUNTY OF LOS ANGELES TAX  
COLLECTOR, and JOHN R. QUINS, COUNTY OF  
LOS ANGELES ASSESSOR.

No. 382

VALLEY UNITARIAN-UNIVERSALIST CHURCH, INC.,

*Petitioner,*

vs.

COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF  
LOS ANGELES, CALIFORNIA; H. L. BYRAM,  
COUNTY TAX COLLECTOR.

No. 385

On Petitions for Writs of Certiorari to the Supreme Court  
of the State of California

## Brief of First Methodist Church of San Leandro and First Unitarian Church of Berkeley as *Amici Curiae* in Support of Petitions

### Interest of *Amici Curiae*

The interest of *amici curiae* is shown by the printed motions to which this brief is appended. In brief summary:

*Amicus curiae* First Methodist Church of San Leandro, whose appeal to this Court was seasonably taken and now pends, believes that the special impact of the challenged California action upon its rights of religion should be



weighed by the Court and that consideration of this brief *amici curiae* will suitably aid that end.

*Amicus curiae* First Unitarian Church of Berkeley, whose case before the court below was consolidated with that of First Methodist Church of San Leandro, is indentically circumstanced with respect to appeal to this Court. It believes that because it has the support and assistance of the American Unitarian Association, the national denominational body, the views it presents may perhaps be more representative of the entire body of Unitarian Churches and Fellowships in California, notwithstanding the autonomy of individual churches fostered by the Association.

Neither *amicus curiae* enters any disclaimer in any wise against the positions taken or arguments made by petitioners in this proceeding. Rather, they wish to have the opportunity to supplement them by additional considerations deemed meritorious and pertinent—particularly considerations relating to religious freedom.

## ARGUMENT

- I. **Both Article XX, Section 19, of the California Constitution and Section 32 of the State Revenue and Taxation Code Prohibit the Free Exercise of Religion, Particularly by Those Churches and Members Thereof Whose Religious Disciplines Place Loyalty to God Above All Other Loyalties or Require Freedom to Pass Moral Judgment Upon the Exercise of Temporal Power, or Both.<sup>1</sup>**

### A. The California Measures Involved.

The Constitution of the State of California contains two provisions directly relevant to the questions before the Court.

1. The referenced state constitutional and statutory provisions are set forth in Appendix A of Petitioners' Consolidated Opening Brief. Following the lead of Petitioners (Consolidated Opening Brief, p. 9, fn. 2), we shall, for ease of reference, hereafter usually refer to the state constitutional provision as Article XX and the state statute as Section 32.

One for more than half a century has provided:

"All buildings, and so much of the real property on which they are situated as may be required for the convenient use and occupation of said buildings, when the same are used solely and exclusively for religious worship \* \* \* shall be free from taxation." Article XIII, Section 11 $\frac{1}{2}$ <sup>2</sup>

The other, Article XX, was adopted by the state electorate in 1952.<sup>3</sup> It provides in relevant part:

"\* \* \* no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:

"\* \* \* Receive any exemption from any tax imposed by this State \* \* \*"

There is also a California statute directly relevant to the question. It, Section 32, provides:

"Any statement, return, or other document in which is claimed any exemption, other than the householder's exemption, from any property tax imposed by this State \* \* \* shall contain a declaration that the person or organization making the statement, return, or other document does not advocate the overthrow of the Government of the United States or of the State of Cali-

2. The full text of this state constitutional provision is set forth in Appendix A to Petitioners' Consolidated Opening Brief, including an amendment extending the exemption to buildings in the course of erection. Now and ever since November 6, 1900, Article XIII, Section 11 $\frac{1}{2}$  has exempted church buildings and real property precisely as quoted above.

3. "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia Board of Education v. Barnette* (1943), 319 U.S. 624 at 638.

fornia by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities. If any such statement, return, or other document does not contain such a declaration, the person or organization making such statement, return, or other document shall not receive any exemption from the tax to which the statement, return, or other document pertains. Any person or organization who makes such declaration knowing it to be false is guilty of a felony. This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution." [Stats. 1953, ch. 1503, § 1 (now codified in Revenue and Taxation Code as Section 32)]

**B. Article XX and Section 32, Each and Both, Prohibit the Free Exercise of Religion.**

The very first words of our Bill of Rights, viz., the first words of the First Amendment to the Constitution of the United States, declare:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: \* \* \*

That this First Amendment prohibition extends to the states of the United States through the Fourteenth is now settled. *Kedroff v. St. Nicholas Cathedral* (1952), 344 U.S. 94, 100, 107; *McCullum v. Board of Education* (1948), 333 U.S. 203, 210-211; *Cantwell v. State of Connecticut* (1940), 310 U.S. 296, 303.

How does Article XX prohibit the free exercise of religion? How does Section 32?

The first requisite to a sound answer is recognition of the truth that "The power to tax involves the power to destroy." (*McCulloch v. Maryland* (1819), 4 Wheat (U.S.) 316, 431.) The second is that Article XX, no less than Sec-

tion 32, is a purported exercise of taxing power. The court below, the final arbiter in defining the meaning of state law, plainly construed it as such, particularly in its rejection of the claim that it violated guarantees of the federal Constitution.

"We turn now to the question of the validity of the constitutional amendment \* \* \* under guarantees of the federal Constitution. We approach this phase of the case in the light of the fact that \* \* \* Article XX prescribes no penal sanctions and in a governmental sense may be deemed merely a declaration of state policy with reference to its own tax structure \* \* \*" 48 Cal. 2d 419, 433.<sup>4</sup>

It is proposed now to spell out the violation by Article XX (that of Section 32 will be covered later) of the federal Constitution's guarantee against laws prohibiting free exercise of religion.

Measuring Article XIII, Section 1½ of the state Constitution against Article XX, it is clear that a church which does not advocate whatever may be condemned by the latter receives the tax exemption. It is also clear that a church which advocates whatever may be condemned by Article XX is denied the tax exemption.

The crux of the matter is now in sharp focus. Article XX, when applied to religions requiring freedom to advocate—regardless of any actual advocacy—squeezes them in a diabolical vise. *At any moment when the requisite religious freedom to advocate may be exercised by advocacy, the tax collector must step in to levy tribute. Such is the mandate*

4. That the court below interpreted both Article XX and Section 32 as tax measures is further clear from its extended discussion commencing at 48 Cal. 2d 426 on through to the quoted language at 433.

*of Article XX.<sup>5</sup> And if the amount of the levy can be satisfied only by confiscation of the church's edifice and all of its material substance—a very practical prohibition of the free exercise of religion—that, so far as Article XX is concerned, is just an incidental misfortune.*

The religious disciplines of First Unitarian Church of Berkeley and of First Methodist Church of San Leandro plainly call for the freedom of advocacy punished by Article XX.

The American Unitarian Association is the official national denominational body of Unitarianism. Living up to the principles of that faith, the Association exercises no hierarchical or other control over the beliefs of the 376 Unitarian Churches and 220 Unitarian Fellowships in the United States.<sup>6</sup> The principle of Unitarianism against imposition of rigid dogma upon individual Unitarian Churches and protecting the basic autonomy of each is well established. Organized on May 25, 1825, in Boston, Massachusetts, the Association was formally incorporated in 1847 by Chapter 42 of the Acts of the Commonwealth of Massachusetts. The nature and scope of the Association are described as follows:

"The Association is a voluntary organization of churches and other religious, educational and philanthropic societies; and life members now empowered to vote, uniting themselves in the furtherance of the purposes enumerated in Article I of the Association's By-laws.

**5. Article XX does not forbid advocacy. It merely puts a price on it. Just pay the tax and, so far as Article XX is concerned, the advocacy it condemns is unrestrained. This incongruous, built-in effect of Article XX is further shared in common with Section 32. See post, p. 15.**

6. The figures are as of April 30, 1957. Unitarian Fellowships are small organized religious groups having no minister.



"In thus associating themselves the individual churches and societies abrogate no part of their independent autonomy: \* \* \*

Unitarian Year Book, 1957-1958, p. 12.

Article I of the Association's By-laws reads as follows:

"Article I. Purposes and Objectives"

"Section 1. In accordance with its charter, the American Unitarian Association shall 'be devoted to moral, religious, educational and charitable purposes.'

"In accordance with these purposes the American Unitarian Association shall:

"(1) Diffuse the knowledge and promote the interests of religion which Jesus taught as love to God and love to man;

"(2) Strengthen the churches and fellowships which unite in the Association for more and better work for the Kingdom of God;

"(3) Organize new churches and fellowships for the extension of Unitarianism in our own countries and in other lands; and

"(4) Encourage sympathy and cooperation among religious liberals at home and abroad.

"Section 2. The Association recognizes that its constituency is congregational in polity and that individual freedom of belief is inherent in the Unitarian tradition. Nothing in these purposes shall be construed as an authoritative test."

Ibid., p. 13.

The religious principles to which members of the First Unitarian Church of Berkeley, incorporated under the laws of California in 1893, are committed are formulated by that Church individually. They are summarized by five articles of faith appearing upon applications for membership, as follows:

"Individual freedom of belief,

"Discipleship to advancing truth,

"The democratic process in human relations,

"Universal Brotherhood, undivided by nation, race or creed,

"Allegiance to the cause of a united world community."

Application for Membership, First Unitarian Church of Berkeley.

Since the religious beliefs which unite members of each individual Unitarian Church are the province of the particular church itself, and since the minister is the spiritual head of the church, there can be no more authoritative statement of the religious principles than that which comes from his lips. Accordingly, there is appended the pertinent enunciation of religious principles of First Unitarian Church of Berkeley by Dr. J. Raymond Cope, who has served as its minister for twelve years.

Dr. Cope's expressions of the abiding Unitarian religious doctrines while completely official for his church, are premised, of course, upon those which draw Unitarians together in their faith everywhere. The latter stem from the work of William Ellery Channing, founding father of Unitarianism in this country. In his "Discourse on Spiritual Freedom", his is the voice of Unitarianism and here are his pertinent expressions of Unitarian doctrine:

"I call that mind free, which protects itself against the usurpations of society, which does not cower to human opinion, which feels itself accountable to a higher tribunal than man's, which respects a higher law than fashion \* \* \* which conscious of its affinity with God, and confiding in his promises by Jesus Christ, devotes itself faithfully to the unfolding of all its powers \* \* \*

"In [society] opinion and law impose salutary restraint, and produce general order and security. But the power of opinion grows into a despotism which more than all things represses original and free thought, subverts individuality of character \* \* \* and chills the love of perfection. Religion \* \* \* which balances the power of human opinion, which takes man out of the grasp of custom and fashion, and teaches him to refer himself to a higher tribunal, is an infinite aid to moral strength and elevation \* \* \*

"The idea of a national interest prevails in the minds of statesmen, and to this is thought that the individual may be sacrificed \* \* \* [But] a man is not created for political relations as his highest end, but for indefinite spiritual progress, and is placed in political relations as the means of his progress. The human soul is greater, more sacred than the state, and must never be sacrificed to it."

4 Works of William E. Channing 67

The religious discipline governing congregants of the First Methodist Church of San Leandro is no less clear in establishing ineradicable inconsistency between their demands and those of Article XX. The basic source of Methodist discipline is, of course, the Bible. Its injunctions requiring undivided allegiance to God, calling for freedom beyond interference by man, are too well known, pervading and repeated for any need to extend this brief with quotations from the source of all Methodist faith.

It is, then, biblical injunction which is the cornerstone of Methodist Discipline calling for undivided, unqualified allegiance to God, not to man or the institutions of man. Such biblical commands underlie the Methodist Discipline and doctrine quoted in the motions to which this brief is appended, Discipline and doctrine demanding that "The

church must be free to bring all persons and institutions under the judgment of the gospel"; that the church must be maintained "not as a creature subservient to the state, but as a free, unintimidated voice, speaking for Almighty God in opposition to error and evil"; and that the church must be protected in freedom "to make moral judgments without coercion from any political institution."<sup>7</sup>

In the context of the relationship between church and state, Methodist religious discipline affirms:

"The American Declaration of Independence declares that life, liberty, and the pursuit of happiness are the inalienable rights of every human being. This implies that these rights are not the gifts of governments, but the gifts of God. Civil governments exist, not to confer these rights, but to guarantee them to all men alike and to protect all men in the fullest possible enjoyment of them. The right to be free implies not only the freedom of the body but the freedom of the mind. \* \* \*

"\* \* \* Our role is not to suppress ideas, but to open channels of communication so that men can come to know the thoughts of their neighbors, and so that the best thoughts of all men can come to be possessions of all mankind."

Paragraph 2024, Discipline of the Methodist Church, 1956.

We have referred to religious principles governing First Methodist Church of San Leandro and First Unitarian Church of Berkeley to emphasize that Article XX is in irreconcilable conflict with these principles in restraining the free exercise of the religions which call for commitment to them. The dictates of Article XX foreclose the exercise of

7. For full statement of the Methodist Discipline and doctrine quoted from, reference is respectfully made, in the interest of avoiding repetition, to pages 3 to 4 of the motions to which this brief is appended and the quotations there are here incorporated by reference.

unrestricted loyalty to God, of freedom to make moral judgments without coercion from political institutions and of the individual right to advocate what might be considered unorthodox in terms of national interest whenever those freedoms may, in the minds of state authorities, be considered inconsistent with the condemnation of Article XX. This points up another ineradicable vice of Article XX in violating religious rights protected under the First Amendment and the Fourteenth.

**The effect of Article XX is to put the state as a censor in every church and in every pulpit.**

In the light particularly of the vagueness of the strictures of Article XX and in the light of the delicate but imperatively vital line between advocacy and incitement, how is any minister of the gospel to know that the preaching of moral belief in his sermon relating to any current event may not be construed as condemned advocacy, with dollar penalties attached? And how is he to protect himself from the dissidents in his congregation who may twist the condemnation of Article XX for ulterior purposes of their own?

**The court below tells us that the prohibitions of Article XX "are mandatory and prohibitory." 48 Cal. 2d 419 at 428. That is to say, they are absolute. Therefore, a minister of the gospel, regardless of whether the declaration demanded by Section 32 has or has not been provided, must, at his peril, measure every word in every sermon against the amorphous, undefined strictures of Article XX. He must constantly be torn between the religious need for free expression in his pulpit and the possibility that it will be construed as subversive by lay authority with the power, if Article XX be valid, to levy tax tribute from his church. If this analysis be true, then the wall separating church and state is indeed demolished. The state has found a powerful seat within the walls of the church.**



Earnestly as we hold the views expressed above, we do not claim that the rights of religious freedom guaranteed by the First and Fourteenth Amendments are absolute. In common with other guarantees of the Bill of Rights, we recognize that the law calls for their measurement and balancing against the rights of the state to security.

In weighing the countervailing considerations, the course of this Court has been clear.

Where, as in *Reynolds v. U.S.* (1878), 98 U.S. 145, in *Davis v. Beason* (1890), 133 U.S. 333, in *Mormon Church v. U.S.* (1890), 136 U.S. 1, and in *Cleveland v. U.S.* (1946), 329 U.S. 14, religious doctrine called for action in plain violation of criminal statutes—statutes prohibiting polygamy—the interest of the state was held paramount.<sup>8</sup>

*Prince v. Massachusetts* (1944), 321 U.S. 158, is illustrative of cases in which protection of religious freedom was subordinated to state power on less compelling grounds than the state's right to prevent crime. There, the interest of the state in providing for the welfare of children was deemed sufficient by the 5-4 majority.

The picture is very different, however, when the professed interest of the state is less compelling than prevention of crime or protection of the young.

In *Watson v. Jones* (1871), 80 U.S. (13 Wall.) 679, the power of the state to determine ownership of property yielded to the right of churches to interpret religious doctrine where such interpretation was crucial to property

<sup>8</sup> *Davis v. Beason* does present some problems. It could be contended that it approves statutory prohibition of mere advocacy of polygamy, as distinguished from effective incitement to polygamy or the practice of polygamy itself. However, it appears that the constitutional objections to outlawing mere advocacy were not urged upon or fully considered by the Court and it appears, further, that the case in the last analysis turns upon perjury.

rights. In *Murdock v. Pennsylvania* (1942), 319 U.S. 105, the power to license the peddling of goods, wares, etc., was subordinated to the paramount right of dissemination of church tracts. In *Martin v. City of Struthers* (1943), 319 U.S. 141, state power to regulate house-to-house canvassing was required to yield to the right of exercising religion in handing out religious tracts. In *Cantwell v. Connecticut* (1940), 310 U.S. 296, state power to regulate solicitation and even to head off potential breaches of the peace, likewise was subordinated to rights of religious freedom. In *Kedroff v. St. Nicholas Cathedral* (1952), 344 U.S. 94, protection of religious freedom prevailed over state law to the extent of recognizing that ecclesiastical law or doctrine controlled the right to use church property, notwithstanding that recognition of the paramountcy of ecclesiastical doctrine vested control of use in the central governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow and the Holy Synod, as against the claims of the Russian church in America. In *Girouard v. U.S.* (1946), 328 U.S. 61, the power of the nation to require the bearing of arms in its defense as a condition of citizenship was subordinated to religious scruples. And in *West Virginia Board of Education v. Barquette* (1943), 319 U.S. 624, supra, the right of religious freedom prevailed over the state's effort to impose a coerced affirmation of loyalty in the form of saluting and pledging allegiance to our flag.

It would seem conservative to say that this Court has resolutely placed the guarantee of freedom of religion under the First Amendment above state power except where the need for preferring state power has been utterly clear and compelling. **It is neither clear nor compelling here. There is no evidence here that any church in California threatens the security of that state or of the United States. There isn't**

**even the pretense of any such evidence. There were no legislative investigations or findings of any kind.**

No church before this Court has been found to threaten or even charged with threatening the security of any temporal power, national, state or local.

Upon analysis, it is clear that the state constitutional provision is grounded in no more than an assumed, but unreal, need for protection of the state and nation. It is also clear that in effect it demolishes the wall of separation between church and state by requiring obeisance from the former to the latter, exacted on pain of penalty which most churches can ill afford, the penalty of taxation as the price of non-conformity.

This brings us to consideration of the impact of Section 32 upon the right of free exercise of religion. It need not detain us long for the reason that every constitutional vice attending Article XX is plainly inherent in Section 32. And Section 32 has supplemental vices readily disclosed by a little analysis.

Section 32's demand for a self-serving protestation of loyalty is innately irrational because it equates refusal to sign a loyalty oath with disloyalty. No disloyalty attends the refusal by the churches before this Court. No one has ever seriously suggested that such is the case. Yet the effect of the statute is to penalize them as disloyal.

And the statute leaves them with no escape from the penalty. They might well be able to satisfy any court or the county assessor of their complete loyalty, by evidence far transcending the facile signing of a self-serving declaration. Indeed, the county assessor may know—even as a congregant—of their loyalty. Yet they must sign or they are punished as disloyal.

There is another, almost incredible, vice in the statutory scheme. Its plain effect is to exact a license fee for what it condemns as disloyalty. Pay the tax and, so far as Section 32 is concerned, disloyalty is immunized.

**No church need sign the demanded declaration. By filling the palm of the tax gatherer, it is at once free of any obligation to sign and, therefore, free of any inhibition stemming from the oath. In effect, the oath scheme here does no more than put a dollar sign upon loyalty.**

There is a further inherent as well as shocking consequence of the actual effect of Section 32. It puts a premium on wealth. As applied to churches, a wealthy church organization can protect its faith against the inroads of the declaration requirement by paying the tax. The smaller, poorer church must yield up its faith or be destroyed."

**ii. Both Article XX, Section 19, of the California Constitution and Section 32 of the State Revenue and Taxation Code Violate the Constitution of the United States Because They Are, in Operating Effect, Laws Respecting an Establishment of Religion.**

We shall not labor our conviction that Article XX and Section 32 are laws respecting an establishment of religion. The meaning of this prohibition of the First Amendment was declared by this Court as follows:

"The 'establishment of religion' clause of the First Amendment means at least this: neither a state nor the

9. **The loyalty oath scheme of the statute cannot be supported by analogy to cases upholding loyalty declarations as a qualification for public service. In such cases, the threat to the state thought to be eliminated by requiring the loyalty declaration is actually eliminated to the full extent that loyalty declarations can so operate. If the applicant or holder does not sign, he is completely barred from the position. Here, the refusal to sign the declaration, coupled with the resulting requisite of paying the tax, leaves the non-exempted organization, so far as Section 32 is concerned, utterly free to pursue ways deemed inimical by Section 32.**

Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Education* (1947), 370 U.S. 1, at 15.

To contend that Article XX and Section 32 do not aid those religions whose doctrines conform to such orthodoxy, as lies in their strictures against advocacy of overthrow and against support of a foreign government in the event of hostilities is to argue against the obvious. Indeed, it is to argue against the interpretation, in this context, put upon these measures by the majority speaking for the court below.

"\* \* \* There are additional interests with which the state is concerned and which it is attempting to promote by granting exemptions from taxation. Included is the interest of the state in maintaining the loyalty of its people and thus safeguarding against its violent overthrow by internal or external forces. *This legitimate objective is sought to be accomplished by placing in a favored economic position, and thus to promote their well being and sphere of influence, those particular persons and groups of individuals who are capable of formulating policies relating to good morals and respect for the law.* \* \* \*" (48 Cal. 2d 419 at 438; emphasis added.)

There could be no more authoritative interpretation than by the Supreme Court of the State of California of the purposes of these state laws. It seems to us that the court below has accordingly virtually conceded that Article XX and Section 32 promote orthodoxy, making it plain that these measures defy the declaration of this Court that:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens



to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624 at 642.

### III. Section 32 Unconstitutionally Subverts the Presumption of Innocence by Demanding of Churches an Expurgatory Declaration as the Price of Tax Exemption.

It is true that in some cases loyalty oaths or declarations have been sustained by this Court. If investigation has revealed threatened disloyalty or if public safety is endangered by the disloyalty of those engaged in public service, it has been held that loyalty oaths may validly be imposed. See, for example, *Gerebde v. Board of Supervisors* (1951), 341 U.S. 56 (candidate for public office), *Garner v. Board of Public Works* (1954), 341 U.S. 716 (municipal employee), *American Communications Ass'n v. Douds* (1950), 339 U.S. 382 (union officials' control through political strikes), *Pockman v. Leonard* (1952), 39 C.2d 676 ("civil defense workers"). Cf. *Wieman v. Updegraff* (1952), 344 U.S. 183 (state employee oath invalid: scienter lacking).

Neither the cited cases nor others like them lend any support whatever to the validity of the oath or declaration demanded pursuant to Section 32. As pointed out earlier, no investigation has revealed disloyalty or the threat of it in churches. As also pointed out earlier, not a scrap of evidence has been or can be adduced to show that worship of God inspires criminal disloyalty or that places of worship harbor traitors or that church goes as a class endanger public safety.

Yet when application for the traditional tax exemption is made by any church in California, it is, in effect, accused, under Section 32, of threatening the state by traitorous conduct. To expurgate this "guilt", it must protest its

innocence, under pain of paying a tax penalty which infringes upon the free exercise of religion guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

As applied to churches, the oath scheme before the Court here is based upon an unfounded, unreasonable and unsupported legislative assumption that religious organizations are guilty of criminal conduct or intent and must purge themselves, by a coerced protestation that they are innocent of crimes that they have neither been accused of nor committed; otherwise they are to be punished summarily by taxation.

Since neither fact nor reason justifies the imposition of expurgatory oaths or declarations upon churches, the legislative scheme runs athwart a clear line of decisions in which the United States Supreme Court has declared it unconstitutional to fix guilt or presumptive guilt by mere legislative fiat. *Cummings v. Missouri* (1866), 4 Wall. (U.S.) 277; *Bailey v. Alabama* (1911), 219 U.S. 219; *McFarland v. American Sugar Co.* (1915), 241 U.S. 79; *Manley v. Georgia* (1928), 279 U.S. 1; *Tot v. United States* (1943), 319 U.S. 463.

The statutory scheme here before the Court is close to being on all fours with *Cummings*.<sup>10</sup> There an article of the Constitution of the State of Missouri, as amended after the Civil War, undertook to impose an oath upon clergymen as a condition of their right to preach and teach. There, as here, the price was to protest, by expurgatory oath, their

10. True, *Cummings* emphasized the bill of attainder and ex post facto consequences of the Missouri oath. However, upon analysis it would seem that the rationale of the case is more strongly bottomed upon protection, so vital to all freedoms in the Anglo-Saxon concept of law, of the presumption that human beings are innocent, not guilty, of crime.

loyalty and their non-support of enemies of the United States. A majority of the court, speaking through Mr. Justice Field, struck down the demanded oath, declaring:

**"The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties."** (4 Wall. (U.S.) 277, at p. 328; emphasis added.)

Nor is the scheme here before the Court for review saved by the difference (if it be a difference) that the right of worship is not totally destroyed by refusal to proffer the demanded expurgatory declaration, i.e., that the only consequence of refusal is exposure to taxation. If the state may not make an expurgatory oath a condition of the right to worship, it may not indirectly achieve the same result by an exercise of its taxing powers wholly unrelated to the raising of revenue. Or, to put it in other words, if the state elects to create the privilege of exemption from taxes, it may not attach unconstitutional conditions as the price of obtaining the exemption. See *Frost Trucking Co. v. R.R. Comm.* (1926), 271 U.S. 583; *Hannegan v. Esquire* (1956), 327 U.S. 146, 157; *Murdock v. Pennsylvania* (1943), 319 U.S. 105, 112; *Hague v. C.I.O.* (1939), 307 U.S. 496, 516; and *Terrall v. Burke Constr. Company* (1922), 257 U.S. 529, 532.

**CONCLUSION**

The decisions below should be reversed.

Respectfully submitted,

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March 14, 1958

**(Appendix Follows)**

## *Appendix*

### **CONCERNING THE RELIGIOUS PRINCIPLES OF FIRST UNITARIAN CHURCH OF BERKELEY**

By J. RAYMOND COPE, *Minister*

In April, 1946, I was called to the ministry of The First Unitarian Church of Berkeley. The governance of the Church is and so far as I know has always been provided for by by-laws subscribed in the following words:

"In the love of truth and the spirit of Jesus Christ, we, whose names are hereunto appended, unite together for the Worship of God, and the service of man."

The First Unitarian Church of Berkeley and the ministry thereof must, in accordance with the religious principles of the Church, be controlled by the following:

1. Fundamental respect for the religious searchings of every individual.

2. A deep-rooted regard, at once searching and tolerant, for all cultures, always emphasizing the spiritual foundations which test their validity. The prophetic\* role of the minister makes it necessary for him to bring those cultures and the temporal institutions manifesting them under constant examination in a manner always freely reflecting the growing insights and needs of man.

3. A dedicated and unqualified commitment within myself to those spiritual truths which I would hold forth for guidance in the lives of others.

\*Like all other Ministers, the call upon me is to fulfill a three-fold assignment: 1. The prophetic role which has precedent going back to the earliest days in Old Testament history; namely, challenging Man and his State to proceed in the light of his highest awareness; 2. Minister to the individual religious needs of my community; and 3. Administrative.



4. An awareness that our church was formed for the Worship of God and the service of man. To meet the call of leadership in the Worship of God, I must be completely free in recognizing that there is something at the heart of the universe, that it is greater than any individual, that it transcends all doctrines and creeds and that it is not limited by any barrier of class or nation.

Man's highest loyalty is to God and worship of Him is an unending search for righteousness and truth. Unitarianism calls for transcendent loyalty to God without the limitations of historical statements of doctrinal position, of temporal power, of denominational restrictions or of requirements of conformity to accepted views no matter how pervasive or prevalent.

The First Unitarian Church of Berkeley from its founding in 1893 has maintained, and so long as it may exist must maintain, separation from the State and resist any professed right of the State to circumscribe the conscience of the church, its members and ministers. The precepts of the First Unitarian Church of Berkeley require constant affirmation of universal truth, affirmation which may call at times for challenge to the very foundations of temporal culture, mores, and institutions. The prophetic functions which devolve upon me and the spiritual obligations of members of the First Unitarian Church of Berkeley would be stultified and destroyed by any transference, however innocuous in appearance or form, of undivided loyalty from God to the state.

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IN THE  
**Supreme Court of the United States**

October Term, 1956

No. 385

THE PEOPLES CHURCH OF SAN FERNANDO VALLEY, INC.,

*Petitioner,*

*vs.*

COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF LOS  
ANGELES, CALIFORNIA; H. L. BYRAM, COUNTY TAX  
COLLECTOR.

Brief of Orange Grove Monthly Meeting of Friends  
of Pasadena, Amicus Curiae, in Support of Peti-  
tion for Certiorari.

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**Brief of Orange Grove Monthly Meeting of Friends  
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tion for Certiorari.**

I.

**INTRODUCTION AND STATEMENT OF  
THE ISSUES.**

Petitioner, Orange Grove Monthly Meeting of Friends of Pasadena, respectfully request the Court's leave to file its Brief, *Amicus Curiae*, in support of the Petition for Certiorari filed in the above-entitled action. Consent of both the Petitioner and the Respondent to the filing of this brief has heretofore been obtained.

The question is whether the California Supreme Court erred in sustaining the validity of Article XX, Section 19, of the California Constitution and of Section 32 of the Revenue and Taxation Code against attack on the grounds



that the enactments infringed freedom of speech and freedom of religion, deprived the Petitioner of equal protection of the laws and deprived it of its property without due process of law, all in violation of the Fourteenth Amendment of the Federal Constitution.

The Orange Grove Monthly Meeting of Friends believe that the legislation is unconstitutional on each and all of these grounds. But in this Brief, as in its Brief *Amicus Curiae* filed in the Court below, the Friends will confine their argument to the unconstitutionality of the legislation predicated upon arbitrary classification in violation of the equal protection clause and upon the deprivation of due process of law by the creation of an arbitrary presumption, the vagueness of the language of the enactments and the lack of any prior notice or opportunity to be heard before being subjected to its penalties.

## II.

### STATEMENT OF INTEREST.

For over three hundred years the Religious Society of Friends (Quakers) has expressed in words and in action the Friends' belief in equality, simplicity and peace. Friends have ever sought to demonstrate their conviction that Christianity can be a religion of reality and practicality in this world and not merely of contemplation and ceremony while awaiting another. The Friends' constant efforts to foster and preserve religious freedom and individual liberty for all men reflect their faith in practical Christianity.

The Friends' interest in the Petition for Certiorari before this Court is twofold: First, the Friends are concerned for the preservation of personal liberty of our society which they feel is unconstitutionally infringed by the California constitutional provision and statute under attack—a concern based upon experiences of Friends dur-

ing the course of their entire history: and second, the Friends are concerned individually because the application of the legislation to them and their church property has compelled them to pay penalties to the State in the form of taxes, arbitrarily exacted. Under the statute attacked, relief from the penalties only comes from the signing of a loyalty oath. To the Friends, this means that relief will never come under the statute because the Friends cannot subscribe the oath: religious convictions of the Friends have forbidden their taking oaths for three hundred years.

The Friends' refusal to take oaths stems from ethical and religious convictions: swearing is contrary to Christ's mandate as stated in the Bible,<sup>1</sup> and even more important to them, swearing acknowledges a double standard of truth, whereas Quakerism will support but one—truth always.<sup>2</sup>

For this social testimony alone, Quakers have undergone great suffering: they have been imprisoned, lost all their property, their homelands, and have suffered death for their refusal to swear.

The Quakers' struggle with oaths began virtually at the birth of the Society in the Middle of the Seventeenth Century. England at that time was in political and religious turmoil. The authority of the Established Church was challenged by the nonconformists; both the Church and the Crown were threatened with real and imagined attempts to restore the Catholic faith as the State religion. Fear and insecurity led to the passage of many statutes designed to stamp out opposition to the Established Church

<sup>1</sup>Quakers rely on the words, "Swear not at all" (Matt. 5:34) and "But above all things, my brethren, swear not," (James 5:12).

<sup>2</sup>William Penn phrased the principle in his epigram, "We dare not swear, because we dare not lie."

and to secure political adherence to the persons then in power.<sup>3</sup> Among the statutes passed were those severely punishing refusal to take a variety of oaths; early loyalty oath statutes were revived and applied with renewed zeal.<sup>4</sup> Not content with catching Quakers in the broader nets, a statute was enacted specifically to persecute Quakers. The Quaker Act of 1662 (15 Car. II, c. 1) punished by fine, imprisonment or banishment any person maintaining "that the taking of an oath in any case whatsoever . . . is altogether unlawful and contrary to the word of God" and wilfully refusing an oath or endeavoring to persuade others to refuse an oath.

The Quakers fought persecution, intolerance and oath taking with traditional Quaker weapons: endurance, passive resistance, patience and work—in prison, in Parliament, in courts of law, in the press, and in pleas and petitions to the State. That campaign was ultimately successful: the old statutes were repealed, amended, or simply allowed to atrophy.

Unfortunately this chronicle did not end in Seventeenth Century England. The same cycle has been repeated again and again. Persecution, intolerance and loyalty oaths reappeared in the New World, first during the Colonial era, and later following the American Revolution when the uneasy new country sought reinforcement by imposing test oaths abjuring the King and declaring allegiance to the new government. The device was revived following the

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<sup>3</sup>Some of the statutes operated directly to punish nonconformists, such as the Conventicle Acts of 1664 and 1670; some enacted more oaths; some punished the failure to take oaths; still others were enacted to apply to other situations but were used to effect further persecution; such as the statutes punishing vagrancy and disturbance of the peace.

<sup>4</sup>*E. g.*, Stats. 5 Eliz., c. 1; 7 Jac. I, c. 6; 16 Rich. II, c. 2, 5.

Civil War. Today this country is once more faced with both real and imagined threats to its internal security. Loyalty oaths have been rediscovered, have proliferated and penetrated the country in a great variety of forms. The causes to be sustained by requiring oaths have changed over the years, but the Quakers' refusal to swear and the reasons for their position have remained unchanged and unmodified over the centuries.

The Friends' persistent refusal to take oaths has been matched by their persistent refusal to resort to violence. Throughout their history, Friends have endeavored to alleviate the suffering caused by wars through relief work and to prevent renewed conflicts by seeking to reduce the causes of war. Their refusal to engage in war has never been engendered by personal fear of hardship or by reason of adherence to any political philosophies or theories; their objections to taking up arms are based upon their religious convictions. The entire history of the Society of Friends and the lives of its members testify that the overthrow of the government by force and violence would be to them unthinkable.

The oath provisions are not only vice of the legislation which this Court is urged to consider; and those provisions are not the exclusive basis of the Friends' interest. The statute alone (California Revenue and Taxation Code Sec. 32) utilizes the venerable loyalty oath device, but it is merely the spawn of the constitutional provision (Art. XX, Sec. 19). Fundamental and searching questions are raised by the constitutional provision in issue. Aside from the grave questions of civil liberties posed by Article XX, Section 19, the article, as interpreted and upheld by the California Supreme Court, violates the guaranties of equal protection of the laws and due process of law of the Federal Constitution by establishing wholly arbitrary classifi-

cations. The Friends believe that the preservation of liberty depends not alone upon assurance of freedom of speech, religion and assembly, but also upon the guarantee of freedom from arbitrary state action in purported exercise of police and taxing powers. If the State may with impunity deprive the individual of his property by capricious and oppressive classifications, tyranny becomes a reality and constitutional government an empty form.

### III. ARGUMENT.

Article XX, Section 19 of the California Constitution and Revenue and Taxation Code, Section 32, violate the Fourteenth Amendment of the Federal Constitution by creating wholly arbitrary classifications and by depriving those persons and organizations so classified of their property without due process of law.

The State's broad power to select the objects of taxation or regulation and to classify those objects is limited by the equal protection clause of the Federal Constitution in at least two respects: first, there must be some identifiable and reasonable difference between the persons or things put into one class and the persons or things put into another, and second, the difference which is the basis of classification must have some reasonable relation to a legitimate legislative purpose.<sup>5</sup>

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<sup>5</sup>The constitutional limitations of the equal protection clause are applicable to statutes enacted in exercise of the taxing power. *E. g.*, *Louisville Gas & E. Co. v. Coleman*, 277 U. S. 32, 37 (1927); *Concordia Fire Ins. Co. v. Illinois*, 292 U. S. 535 (1934); *Air-Way Electric Appliance Corp. v. Day*, 266 U. S. 71 (1924). The same constitutional limitations apply to legislation enacted in exercise of the police power. *E. g.*, *Connolly v. Union Seaver Pipe Co.*, 184 U. S. 540, 560 (1901); *Truax v. Corrigan*, 257 U. S. 312 (1921); *Takahashi v. Fish & Game Commission*, 334 U. S. 410 (1948).



There are two sources of state power which may be invoked to support the enactment of the legislation in issue: the police power and the taxing power. If the legislative purpose in compelling an exaction is the raising of revenue for public purposes, the legislation imposes a tax and its constitutionality should be tested with reference to that purpose. If the legislative purpose is the regulation of persons or activities, the exaction compelled is not a tax (regardless of its label), but is in the nature of a penalty, and its constitutionality should be tested with reference to that purpose.<sup>6</sup>

**A. The Classification Made by the Legislation in Issue Is Unconstitutional as an Exercise of the Taxing Power.**

**(1) The Legislation Imposes a Tax.**

If the measures are considered as exercises of the taxing power, the provisions are in their nature taxing, rather than exemption provisions. Article XX, Section 19 does not relieve from taxation; it imposes a tax upon property of all persons and organizations within its ambit which was not previously taxed. In terms it has no application to property which was taxable.

In this case the property in issue was used solely and exclusively for religious worship owned by a church. There is no indication that the property was used for any

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<sup>6</sup>As Professor Freund states in Freund, *Police Power*, §26, p. 21: "The sanction of a law passed in exercise of the police power is usually a penalty and the violation of the law constitutes technically a crime. . . ." This Court has frequently recognized that an exaction labeled a "tax" may be in reality a penalty; the characterization of the exaction is, of course, critical in federal legislation since the Federal Government does not possess the police power. See *United States v. La Franca*, 282 U. S. 568, 572 (1931); *United States v. Chautau*, 102 U. S. 603.

other purpose which was tax exempt.<sup>7</sup> If the property had been used for any non-tax exempt purpose, the legislation in question would be entirely immaterial.

## **(2) The Classification Is Arbitrary.**

In testing the validity of taxing measures, the classes created must be identified and the distinction among the classes must be analyzed to determine whether the difference, which is the basis of classification, has any relationship to the legislative purpose of raising revenue.

The first step is the determination of the object of the tax: what is being taxed? The object of a tax may be a person (*e.g.*, a head or poll tax), a privilege (*e.g.*, corporate franchise), or real or personal property. The legislation in issue purports to tax property; the object of the law is the property itself. It is not the person or persons who own the property. Therefore the difference in treatment for tax purposes should be based upon some real difference in the property taxed: there is no rational distinction between the property taxed and the property not taxed in the classification created by the legislation attacked. The classification is not based upon any distinction relating to the tax object—the nature, value, extent, location, or any other characteristic of the prop-

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<sup>7</sup>The property was tax exempt by reason of the provisions of Article XIII, Section 11 1/2 of the California Constitution; other provisions of the Constitution exempt property used for other specified purposes, including property used for growing crops, colleges, orphanages, free public museums and libraries, public schools, hospitals and certain other charitable purposes if owned by qualifying nonprofit organizations. None of these provisions has any application to the case at bar.

erty; it is based solely upon a selected personal characteristic of the person or organization owning the property.

For example, assume that Church *A* owns real property used solely and exclusively for religious worship; Church *A* does not advocate. Church *B* owns real property used for the same purpose which is in all respects identical with that of Church *A*; Church *B*'s property is taxed. Yet the object of taxation is identical; the property is placed in separate classes for tax purposes solely because of the views of the owners of the property.

On the other hand, if we assume that the object of the tax is the person or organization owning the property, the classification made is no more rational than that previously mentioned.

The classification does not depend alone upon advocacy or non-advocacy, or upon ownership or non-ownership of property subject to tax. The statute creates a new class based not upon advocacy, not upon property ownership, not upon the nature of the property owned, but upon the predisposition of the persons, or some of them, who own the property, to sign an oath. The connection between refusal or willingness to sign an oath and the raising or protection of the public revenue is not simply tenuous—it is nonexistent.

## B. The Classification Is Arbitrary as an Exercise of Police Power.

The state may properly select those persons and activities it wishes to regulate and may classify them to further the public health, safety and welfare. That the state may legitimately act to prevent its overthrow by force and violence is not here questioned. But the basis of the classification must have some rational connection to the end to be achieved.

The legislation in issue was apparently designed to penalize persons and organizations which the state conceived to threaten its internal security. It is a punitive measure. Its character can easily be ascertained by re-framing the language of the constitutional amendment in terms which reach precisely the same result: *Any person or organization which advocates shall be subject to a penalty measured by the amount of any tax exemption heretofore granted to such person or organization.*

The constitutional amendment penalizes all persons or organizations which advocate and which own property subject to tax; it does not penalize all persons or organizations which advocate but which do not own property subject to tax (or property formerly tax exempt). Upon all persons situated in the first class there is imposed a penalty measured by the value of taxable property owned (or, in other words, measured by the amount of any pre-existing tax exemption). No penalty is imposed upon members of the latter class.

This classification is based upon a mere difference which has no relationship to the legislative end. The activities

or conduct of the persons or organizations in either class may be identical; indeed, the activities of organizations which do not own tax exempt or taxable property may be more culpable and more dangerous than those of the penalized class.

Not only is the classification arbitrary but the penalty is equally arbitrary. The magnitude of the penalty does not depend upon or have any relation to the character of the activity or conduct penalized nor upon any personal characteristic of the offender related to the offense. The size of the penalty is fixed solely by the fortuitous circumstance of the amount of a tax exemption which the offender might have!

The classifications added by the statute are even more fanciful than those created by the constitutional amendment. In the statute, the imposition of the penalty does not even depend upon advocacy, but only upon willingness to sign an oath. It is idle to say that the imposition of the penalty depends upon advocacy: this may be what the legislators had in mind, but that is not what the statute provides. An organization may prove beyond a reasonable doubt that it does not advocate, but, if it has not signed the oath, it has not complied with statutory prerequisites and its proof is fruitless. The statute expressly forbids receipt of any exemption in the absence of a signed declaration.

The statute gives more favorable treatment to one who does advocate, but who falsely signs the oath. The statute does not penalize his advocacy. Nothing in the



statute states that the fact of advocacy deprives the individual of his tax exemption. The constitutional amendment so provides, but there is no machinery for its enforcement: it is simply an enabling act. The false signer may be prosecuted for his false swearing, but in that hearing, presumably, he would have the benefit of the presumption of innocence and the burden would be upon the state to prove guilt beyond a reasonable doubt. As the statute presently stands, therefore, the person who has no compunctions either about overthrowing the government or about swearing falsely still receives his tax exemption and retains a presumption of innocence, while the individual who does not advocate, but refuses to swear that he does not, is deprived of both.

The effect of the statute is to create a conclusive presumption of a guilt of a crime (advocacy of violent overthrow of the government), solely from refusal to sign the oath. Any other reason for refusal to sign is by statute made immaterial.<sup>8</sup>

### **C. The Legislation Deprives the Prescribed Classes of Their Property Without Due Process of Law.**

The enactments impose penalties upon the persons and organizations within ambits, without any ascertainable

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<sup>8</sup>The creation of a conclusive presumption of advocacy merely from refusal to sign an oath is a deprivation of due process of law. The presumption is obviously arbitrary where it is applied to the Quakers whose refusal stems from religious convictions and is completely unrelated to advocacy. *Cf. Heiner v. Donnan*, 285 U. S. 312 (1931); *United States v. Tot*, 319 U. S. 463 (1943); *Adler v. Board of Education*, 342 U. S. 485 (1951).

standard for determining who is within and who is without their terms. The legislation penalizes not only advocacy of violent overthrow of the government, but also advocacy of "support of a foreign government against the United States in event of hostilities." The former phrase has been difficult to define, but the latter defies definition. All that can be done is to speculate upon the possibilities of its meaning. For instance, is the Friends' relief program to the victims of war, the children of countries which are hostile to the United States, condemned? The terms are unconstitutionally vague.<sup>9</sup>

The enactments may be searched in vain, for any provisions permitting any prior notice or any opportunity whatsoever to be heard. The oath and the oath alone is made the substitute for the most elementary concepts of due process.<sup>10</sup>

#### IV. CONCLUSION.

The Friends earnestly urge the Court to grant certiorari to review this case.

The decision of the issues raised affect not only your Petitioner, the Friends and all other persons and organi-

<sup>9</sup>Due process requires that a statute must be framed in terms which are sufficiently clear to permit persons of ordinary intelligence to understand who is within the scope of the act, and, in a penal statute, to permit ascertainment of some statutory standard of guilt. *E. g., Lanzetta v. New Jersey*, 306 U. S. 451, 453 (1939); *Connally v. General Construction Co.*, 269 U. S. 385 (1926); *Stromberg v. California*, 283 U. S. 359 (1930).

<sup>10</sup>*Cf. Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123 (1951); *Adler v. Board of Education*, 342 U. S. 485 (1951).

zations with tax exempt status in California, but the issues also affect people throughout the country where legislation of similar import has been proposed or has already been enacted.

Respectfully submitted,

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*Of Counsel.*

**LIBRARY** MOTION FILED FEB 12 1958  
**SUPREME COURT. U. S. No. 385**

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IN THE  
**Supreme Court of the United States**

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**OCTOBER TERM, 1957**

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**THE PEOPLES CHURCH OF SAN FERNANDO VALLEY, INC.,**

*Petitioner*  
v.

**COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF LOS  
ANGELES, CALIFORNIA; H. L. BYRAM, COUNTY TAX  
COLLECTOR,**

*Respondents*

**On Writ of Certiorari to the Supreme Court of the State  
of California**

---

**Motion for Leave to File and Brief of Philadelphia  
Yearly Meeting of the Religious Society of Friends,  
American Friends Service Committee, Inc., Amici  
Curiae, in Support of Petitioner.**

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IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1957**

**No. 385**

THE PEOPLES CHURCH OF SAN FERNANDO VALLEY, INC.,  
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COUNTY OF LOS ANGELES, CALIFORNIA; CITY OF LOS  
ANGELES, CALIFORNIA; H. L. BYRAM, COUNTY TAX  
COLLECTOR,  
*Respondents*

On Writ of Certiorari to the Supreme Court of the State  
of California

**Motion for Leave to File and Brief of Philadelphia  
Yearly Meeting of the Religious Society of Friends,  
American Friends Service Committee, Inc., Amici  
Curiae, in Support of Petitioner.**

**I.**

**MOTION FOR LEAVE TO FILE THE WITHIN  
BRIEF**

**TO THE SUPREME COURT OF THE UNITED  
STATES:**

The motion of Philadelphia Yearly Meeting of the  
Religious Society of Friends and the American Friends  
Service Committee, Inc., respectfully represents:

(1) Philadelphia Yearly Meeting of the Religious Society of Friends is an organization of ninety (90) constituent Quaker Meetings in a four-state area surrounding Philadelphia. Philadelphia Yearly Meeting believes that it must express the traditional opposition of the Religious Society of Friends to oaths and declarations such as that which California exacts, and that it must express this opposition now, before Friends groups in other states are confronted with similar declarations;

(2) The American Friends Service Committee, Inc., is a corporation chartered to engage in religious, charitable, social, philanthropic and relief work in the United States and in foreign countries on behalf of the several branches and divisions of the Religious Society of Friends in America, and also to promote the general objects and purposes of the several branches and divisions of the Religious Society of Friends in America. The American Friends Service Committee, Inc., which has consistently sought to aid and comfort the afflicted whether legally friend or enemy, believes that declarations such as that required by California may seriously hamper and curtail many of the activities to which it is committed in California and elsewhere both by its Charter and by the convictions of its membership and personnel. It further believes that the existence and spread of declarations similar to the one here involved may injuriously affect and seriously hamper the carrying out of the objects and purposes of the several branches and divisions of the Religious Society of Friends in America;

(3) Amici Curiae sought the consent of Petitioner and Respondent to the filing of the within brief.

Petitioner gave consent but Respondent refused; hence the present motion.

(4) Applicants on information and belief aver that the oral argument and briefs of the parties to the case will not adequately present the argument to be made herein, which is directed solely to the contention that the California loyalty declaration offends that freedom of conscience which is asserted and professed by the Religious Society of Friends.

WHEREFORE, applicants earnestly request the Court to grant this motion for leave to file the within brief.

By

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HAROLD EVANS

---

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*Counsel for Philadelphia  
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ligious Society of Friends*

---

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## II.

## STATEMENT OF INTEREST

The interests of *amici curiae* have been set forth in the Motion for Leave to File the Within Brief.

## III.

## ARGUMENT

THE CALIFORNIA DECLARATION ABRIDGES THE FREEDOM TO SEEK THE TRUTH AND THE FREEDOM TO ACT UPON THE TRUTH AS IT IS MADE KNOWN TO THE SEEKER.

It is the belief of the Religious Society of Friends that truth is continually revealed to every individual human being. This revelation is the result of direct communication between God and man. Rufus Jones, leading Quaker teacher and religious philosopher, states the Quaker belief this way:

"If God ever spoke He is still speaking. If He has ever been in mutual and reciprocal communication with the persons He has made, He is still a communicating God, as eager as ever to have listening and receptive souls. If there is something of His image and superscription in our inmost structure and being, we ought to expect a continuous revelation of His will and purpose through the ages. . . . He is the *Great I Am*, not a *Great He Was*."<sup>1</sup>

To require a declaration of disbelief in certain doctrines is to break in upon the continuing revelation of

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<sup>1</sup> Jones, *A Call to What Is Vital* (1948), p. 65.



truth as it develops from the direct relation between God and man. It is to enforce a surrender of the freedom to seek the truth unbound by moral or legal commitment to believe or to disbelieve.

This area of freedom has been foreclosed to governmental intrusion, federal or state, by the First Amendment to the Constitution, for:

"With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted. . . ." <sup>2</sup>

And again:

" . . . [Under the Constitution] Man's relation to his God was made no concern of the state." <sup>3</sup>

Since truth can never be finally and fully determined in this world, the Society of Friends has sought to avoid partisan commitments to currently favored doctrine. This position was stated in a report to the Friends World Conference of 1937:

"One of the most important missions of a Society like ours is its *prophetic service*. We maintain that we must not merely be *identified* with a party, or a division, or a given system, or a prevailing theory. We must be free and broad-visioned enough to see around and beyond the partial one-sided aspect of the issue for which the 'party' stands and to seize the ethical and spiritual significance of the whole situation before

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<sup>2</sup> *United States v. Ballard*, 322 U. S. 78, 87 (1944).

<sup>3</sup> *Ibid.*

us, and deal with it from above the storm and controversy and propaganda of the moment."<sup>4</sup>

To execute a disavowal of belief is to be morally and legally identified with a "given system" or a "prevailing theory" which may not turn out to be what is needed in a fast-changing world. Many Friends believe that what is needed now are proposals which will foster reconciliation and good will between all peoples everywhere, not professions of hatred for an enemy state. A declaration of non-advocacy of the overthrow of government by unlawful means may not appear to require narrow partisanship, but the history of the Society of Friends shows that too often the espousal of unpopular ideas is equated in the minds of many with subversion. A notable example is the reaction that was provoked by the support of Friends for the abolition of slavery.<sup>5</sup>

The declaration required by California goes beyond nonadvocacy of violent overthrow. It includes nonadvocacy of overthrow by "other unlawful means," and nonadvocacy of the support of a foreign government in the event of hostilities. The range of non-treasonable belief and action which might be foreclosed by such a declaration is beyond our power to foresee. What assurance can be given that it would not prohibit material or moral aid to the victims of war or other catastrophe in enemy lands, if the temper of the times in America were to run against such aid? Acting through organizations such as *amici curiae*, Friends have consistently sought to provide food,

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<sup>4</sup> Report of Commission I to Friends World Conference, 1937, reprinted in *Faith and Practice of the Philadelphia Yearly Meeting of the Religious Society of Friends* (1955), pp. 112-113.

<sup>5</sup> See 2 Stokes, *Church and State in the United States* (1950), pp. 176-177.

clothing and shelter to human beings who need them without regard to nationality or political belief. As circumstances have permitted, *amici curiae* have been eager to help inhabitants of North Korea during the hostilities in Korea, residents of Hiroshima following the bombing by American planes in Japan, and Japanese-Americans who were moved from their homes into relocation centers in America. What assurance can be given that a declaration of nonsupport of a foreign government would not prohibit responsible criticism by religious groups of governmental policies in times of crisis? Such groups can contribute significantly to the formulation of national policy on such supremely important matters as disarmament and the testing of nuclear weapons if they are free to do so. They will be free to do so only if they are free to seek the truth and to act upon it. California will grant a tax exemption only upon surrender of these freedoms.

THE CALIFORNIA DECLARATION REQUIRES AN ACCOUNTING  
TO THE STATE OF BELIEFS FOR WHICH MAN IS AC-  
COUNTABLE ONLY TO GOD.

The book of *Faith and Practice* of Philadelphia Yearly Meeting of the Religious Society of Friends states a fundamental tenet of Quakerism as follows:

We affirm the supremacy of conscience. We recognize the privileges and obligations of citizenship; but we reject as false that philosophy which sets the state above the moral law and demands from the individual unquestioning obedience to every state command. On the contrary, we assert that every individual, while owing loyalty to the state, owes a more binding loyalty

to a higher authority—the authority of God and conscience.”<sup>6</sup>

A similar expression of the allegiance owed respectively by the individual to his State and to his God appears in *Girouard v. United States*:

“The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.”<sup>7</sup>

This statement by the Court expresses the position not only of the Religious Society of Friends but of many major religions based upon the dignity and worth of the individual.

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<sup>6</sup> *Faith and Practice*, *supra*, pp. 38-39. This modern statement is not significantly different from the one Friends adopted in England in 1675:

“Since God hath assumed to himself the power and dominion of the conscience, who alone can rightly instruct and govern it, therefore it is not lawful for any whatsoever, by virtue of any authority or principality they bear in the government of this world, to force the consciences of others; and therefore all killing, banishing, fining, imprisoning, and other such things, which men are afflicted with, for the alone exercise of their conscience or difference in worship or opinion, proceedeth from the spirit of Cain, the murderer, and is contrary to the truth.

Quoted in 1 Stokes, *supra*, p. 114.

<sup>7</sup> 328 U. S. 61, 68 (1946).

If the State can require a disavowal of belief it can also require a disclosure of belief. If it can require a disclosure of belief it is in a position to prescribe belief. *Amici curiae* believe that the State can do none of these things, and in this belief are supported by the following statements from the opinion of this Court in *West Virginia v. Barnette*:

"To sustain the compulsory flag salute we [would be required] to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind. . . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."<sup>8</sup>

The Religious Society of Friends came into being at a time when the Stuart monarchs sought to prescribe for Englishmen what should be orthodox in religion, and sought to enforce this orthodoxy through the imposition of a succession of oaths. Leaders of the new movement, including William Penn, refused repeatedly to take such oaths, and struggled continuously against their application. For this obstinacy literally thousands of Friends were put into jail.<sup>9</sup> In part their steadfast opposition was founded upon

<sup>8</sup> 319 U. S. 624, 634, 642 (1943).

<sup>9</sup> In the year 1680 there was presented to King Charles II and to Parliament a petition entitled "The Case of the People Called Quakers", in which it now appears to have been accurately stated



Biblical injunctions against swearing in the name of God. To that extent these historic objections to oaths, including of course the judicial oath, do not appear applicable to the declaration required by California. In part, however, the seventeenth-century test oath was fought because it was an integral part of the State's machinery for enforcing conformity to the State's religion. When an opportunity to found a colony in America was presented, William Penn and other Quaker leaders were unswerving in their determination that oaths which tested religious belief were to be left behind. Penn's "Great Law" which was adopted by the province of Pennsylvania in 1682 declared that:

" . . . no person . . . shall in any case be molested or prejudiced for his, or her Conscientious persuasion or practice."<sup>10</sup>

The principle of absolute liberty of conscience recurs in all of the various Frames and Charters prepared by Penn for his province, and is repeated in the Pennsylvania Constitution of 1776. Penn's belief in religious freedom, and the successful application of his belief to the Quakers' Holy Experiment in government, were well known to the

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that during the twenty-year period since the Restoration a total of 10,778 persons had died in prison, been imprisoned, excommunicated, or sentenced to banishment for refusal to obey the penal laws then in force designed to compel religious conformity. This era of persecution is described in Comfort, *William Penn and Our Liberties* (1947) Chapter II.

Among the oaths imposed during the period was one aimed specifically at Friends, the Quaker Act of 1662 (15 Car. II, c. 1). This Act penalized, inter alia, advocacy of the belief that the taking of an oath was unlawful and contrary to the word of God.

<sup>10</sup> Reprinted in 1 Stokes, *supra*, p. 206.

meh chiefly responsible for framing the Bill of Rights. James Madison wrote:

"Pennsylvania may well be proud of such a founder and lawgiver as William Penn, and an obligation be felt by her enlightened citizens to cherish by commemorations of his exalted philanthropy and his beneficent institutions, their expanding influence in the cause of civil and religious liberty."<sup>11</sup>

As the history of the colonial experience makes very clear, the constitutional guarantee of religious freedom was intended to protect the inner belief as well as the outward manifestation. An enforced token or pledge in matters either spiritual or temporal can accordingly not be countenanced. In the words of Chief Justice Stone, dissenting in *Minersville School District v. Gobitis*:

"The very essence of the liberty which [the Bill of Rights guarantees] is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion."<sup>12</sup>

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<sup>11</sup> "Poulson's American Daily Advertiser" for October 28, 1826, quoted at the beginning of Comfort, *supra*. In the same issue appeared a statement in similar vein by Thomas Jefferson. It is clear from correspondence that at least as early as 1774 James Madison was familiar with the conditions of religious freedom which obtained in Pennsylvania. 1 Stokes, *supra*, p. 340.

<sup>12</sup> 310 U. S. 586, 604 (1940). The *Gobitis* case was overruled in *West Virginia v. Barnette*, 319 U. S. 624 (1943).

It was the belief of Justice Holmes, dissenting in *United States v. Schwimmer*, that the same principles should govern the admission of aliens to citizenship:

"... but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate. . . . And recurring to the opinion that bars this applicant's way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount."<sup>13</sup>

In its letter accompanying the tax which it paid under protest to the Tax Collector of Los Angeles County, Orange Grove Monthly Meeting of Friends in referring to the California statute which imposes the declaration stated:

"We regard this law as a violation of religious freedom of conscience, for our first loyalty is to God, only secondarily to man and the state."

In imposing its nonadvocacy declaration California assumes an accountability that no man owes to any government.

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<sup>13</sup> 279 U. S. 644, 654-655 (1929). The *Schwimmer* case was overruled in *Girouard v. United States*, 328 U. S. 61 (1946).

## THE CALIFORNIA DECLARATION DOES VIOLENCE TO THE MINDS OF MEN WHOSE LOYALTY CANNOT BE COERCED.

Many men are not offended by enforced declarations of loyalty. They may in fact welcome every opportunity to profess a loyalty in which they feel secure. For others it is not so easy. In this second group are a great many who could not perform a treasonable or a violent act. Their loyalty cannot reasonably be questioned; it is based upon inner and personal conviction. They are not loyal because they have been told that they ought to be, nor do they believe that their loyalty will be increased because the state requires them to declare it and withholds tax exemption if they will not do so. On the contrary, in their view a coerced loyalty cannot be a substitute for a loyalty freely given, nor can it produce loyalty where loyalty does not already exist. With William Penn, they believe that "force never yet made either a good Christian or a good subject."<sup>14</sup> If loyalty is love of country, Shakespeare's lines are appropriate:

"That love is merchandized whose rich esteeming  
The owner's tongue doth publish every where."<sup>15</sup>

There does not appear to be any reason for assuming that men who are sensitive about the circumstances under which they pledge or manifest their loyalty are on that account less loyal than those who gladly seize every chance to proclaim it. There may in fact be some reason to believe that the loyalty of men who prize it so highly that it cannot be exacted from them is a loyalty peculiarly worth having. Spinoza said:

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<sup>14</sup> William Penn, *The Great Case of Liberty of Conscience* (1670), reprinted in Tolles and Alderfer, eds., *The Witness of William Penn* (1957), p. 81.

<sup>15</sup> The Sonnets of William Shakespeare, No. 102.

"Laws directed against opinions affect the generous-minded rather than the wicked, and are adapted less for coercing criminals than for irritating the upright. . . . What greater misfortune for a state than that honourable men should be [treated] like criminals . . . ? <sup>16</sup>

If men of this type are in a minority, as they seem to be, this is an instance where government can well afford to respect, if not to honor, a minority belief. Especially is this true when it has yet to be demonstrated that the declaration required by California makes any contribution to public security or welfare.

One of the oaths required of Friends in seventeenth-century England involved a disavowal of belief in the Catholic doctrines of transubstantiation. Friends did not believe in these doctrines, but in matters of belief they would not be coerced. So it is with enforced disavowals of advocacy of force and violence. The Religious Society of Friends has from its beginnings held and maintained a testimony against the use of violence in man's relations with his fellow men. Differences arising between men or between nations of men cannot be settled in a lasting way on any basis other than mutual good will and love. To interpret a Quaker Meeting's refusal to execute a declaration of non-violent intent as a desire to engage in violence is to ignore or misread three hundred years of Quaker belief and practice. The violence in the requirement of such a declaration is the violence done to the minds of men whose loyalty cannot be coerced.

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<sup>16</sup> Spinoza, *Theologico-Political Treatise*, c. 20, cited in Chafee, *The Blessings of Liberty* (1956), p. 250.



## CONCLUSION

If the State can discriminate in regard to taxes among religious groups on the basis of what they are willing to declare as their views in an area where religion and politics meet, the State is itself declaring what is and what is not patriotic religious orthodoxy, and freedom of conscience has ceased to exist. To us it appears that the California declaration requires Quakers to say now how they will in the future interpret the Sermon on the Mount.

It is respectfully submitted that the decision of the California Supreme Court should be reversed.

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